

(23,152)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 1076.

GEORGE H. HOLT, DOING BUSINESS AS GEO. H. HOLT &
COMPANY, APPELLANT,

vs.

NORVELL L. HENLEY, TRUSTEE; THE PENINSULA BANK
OF WILLIAMSBURG, VIRGINIA, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE FOURTH CIRCUIT.

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UNITED STATES OF AMERICA, ss:

At a United States Circuit Court of Appeals for the Fourth Circuit, begun and held at the Court House, in the City of Richmond, on the first Tuesday in February, being the sixth day of the same month, in the year of our Lord one thousand nine hundred and twelve.

Present: Hon. J. C. Pritchard, Circuit Judge; Hon. Alston G. Dayton, District Judge; Hon. John C. Rose, District Judge.

Among other were the following proceedings, to-wit:

No. 1063.

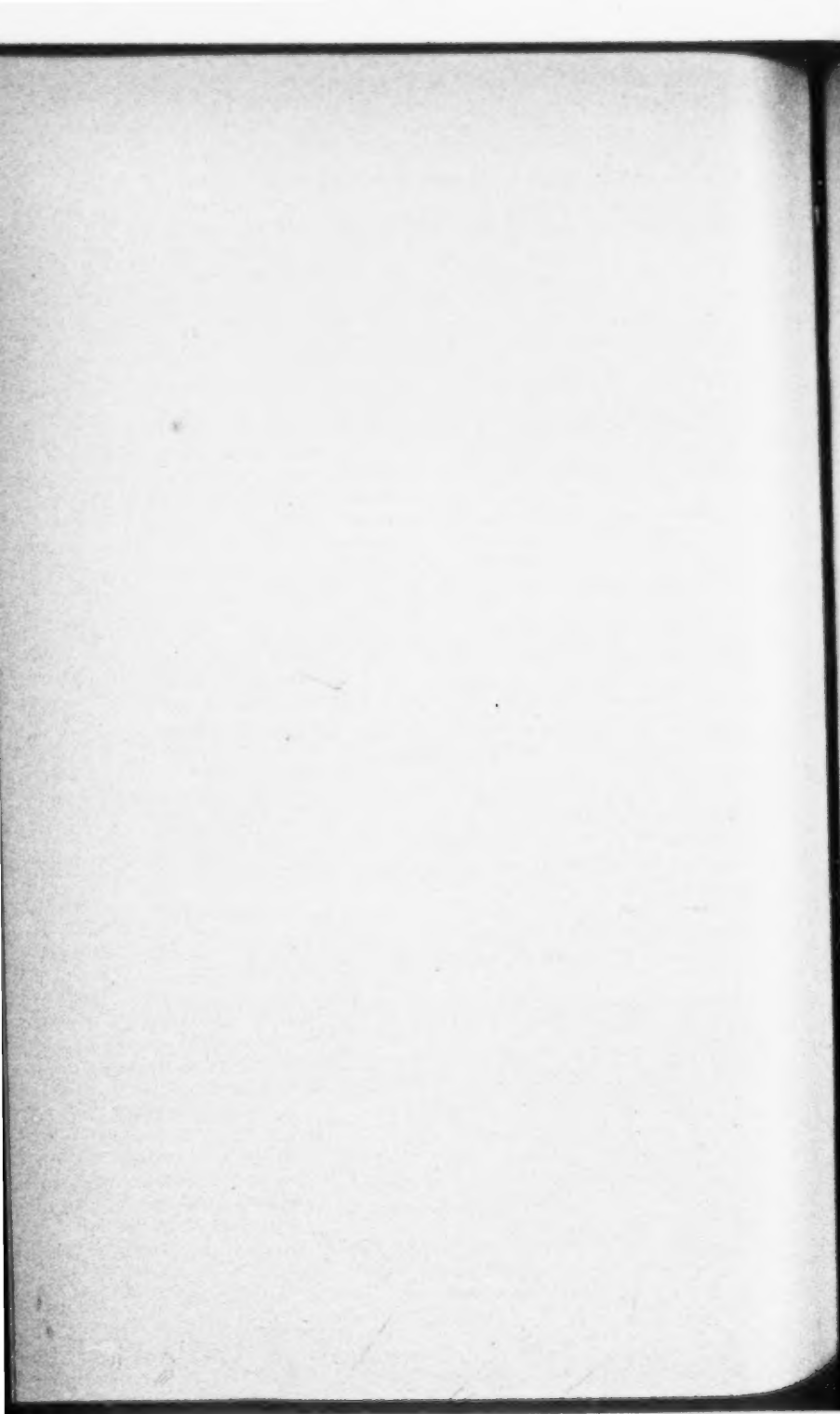
GEORGE H. HOLT, Doing Business as Geo. H. Holt & Company,
Appellant,
versus

NORVELL L. HENLEY, Trustee; THE PENINSULA BANK OF WILLIAMSBURG, VA., The Virginia Trust Company, Trustee, and H. N. Phillips, J. B. C. Spencer, and Willoughby T. Cooke, Trustees in Bankruptcy of Williamsburg Knitting Mills Company, Bankrupt, Appellees.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk. In Bankruptcy.

Be it remembered that heretofore, to-wit: on the 25th day of August, 1911, the transcript of the record of the said District Court in the said above entitled cause was transmitted to and filed in our said Circuit Court of Appeals here, which is as follows, to-wit:—

(a)



TRANSCRIPT OF RECORD.

UNITED STATES OF AMERICA, }
EASTERN DISTRICT OF VIRGINIA, } ss:

At a District Court of the United States for the Eastern District of Virginia, begun and held in the Post Office Building, in the City of Norfolk, Virginia, on the first Monday in the month of May, being the first day of the same month, in the year of our Lord one thousand nine hundred and eleven.

Present: The Honorable Edmund Waddill, Jr., Judge of the District Court of the United States for the Eastern District of Virginia.

Among other were the following proceedings, to-wit:

In the matter of
Williamsburg Knitting Mills Company, } In Bankruptcy.
Bankrupt.

On petition of George H. Holt, }
trading as George H. Holt and Company. }

PETITION OF GEORGE H. HOLT, TRADING AS GEORGE H. HOLT AND COMPANY.

Filed September 26th, 1910.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF VIRGINIA.

In the matter of
Williamsburg Knitting Mills Company, } In Bankruptcy.
Bankrupt.

(2) The petition of Geo. H. Holt respectfully represents that he has been for a long time and is now trading and conducting business under the firm name and style of Geo. H. Holt & Company, and is the Geo. H. Holt & Company hereinafter mentioned as party of the first part in the written agreement filed as Exhibit "A."

That on the 25th day of August, 1909, at the City of Williamsburg, Virginia, under said firm name entered into a contract and agreement with the Williamsburg Knitting Mill Company, to procure for it the installation in its plant at the City of Williamsburg, Virginia, a complete automatic sprinkler system & equipment; that said contract and agreement was in writing signed by the parties thereto and contains certain mutual covenants, conditions and agreements therein specified; said written contract and agreement is here filed as part of this petition, marked Exhibit "A" and prayed to be read as such.

That your said petitioner as party of the first part in said written agreement fully completed and performed all his agreements therein promised and undertaken and completed and finished his undertakings by the installation of said complete automatic sprinkler system and equipment in the plant of the said Williamsburg Knitting Mill Company, the work on said installation being completed on the first day of March, 1910.

On the completion of said work of installation, to-wit: on the 1st of March, 1910, the said Williamsburg Knitting Company paid over to your petitioner the cash installment of twenty-one hundred and three (\$2,103.00) dollars then due under the terms of said written agreement, leaving a balance of six thousand three hundred and nine (\$6,309.00) dollars to be paid in three deferred annual installments of \$2,103.00 each to be paid to your petitioner respectively, on the successive (3) sive anniversaries of the date of said cash payment, which when paid your petitioner as party of the first part, by the terms of said agreement, agreed to execute and deliver to the said party of the second part, (Williamsburg Knitting Mill Company) a bill of sale or other such instrument as might be necessary, conveying the said sprinkler system and equipment to the said party of the second part, and it is further specified in said written agreement, Exhibit "A" that in the event of the failure of the party of the second part to pay the said deferred installments as therein provided, or to carry out or fulfill any other of the conditions of said agreement, your petitioner should have the right, in addition to any and all other rights belonging to him, to take out and remove said equipment and to enter the premises for that purpose and to declare the full amount of the unpaid installments to be immediately due and payable.

It is further provided in said written agreement that the said sprinkler system equipment shall be and remain the property of your petitioner until title thereto be acquired by the said party of the second part by payment therefor in full, as

provided in said agreement and until then be, and be considered, as personal property and not a part of the realty.

As a special condition of said contract the said Knitting Mill Company covenanted that it was the sole and unconditional owner in fee simple of the land, buildings and contents comprising the plant, then to be equipped as aforesaid, subject to no conditions, incumbrances or liens of any kind, except a trust deed to the Virginia Trust Company, trustee, to secure a bonded indebtedness of \$1,800.00 and that it would protect and indemnify your petitioner against purchasers without notice and that "No sale, mortgage or other disposition or incumbrance of the buildings, plant or premises" "nor any act (4) or transaction that might affect the title of your petitioner to the said sprinkler system should occur" or be negotiated without a reasonable prior written notice to your petitioner.

Your petitioner charges that on the 23rd day of November, 1909, the said Knitting Mill Company, by H. S. Bird, its president, did convey their said buildings, plant and premises, without previous notice to your petitioner, to Norvelle L. Henley, trustee, to secure to the Peninsula Bank of Williamsburg, Virginia, the payment of over \$10,000.00 mentioned in said deed of trust.

Your petitioner is informed, believes and charges that the same H. S. Bird who as president of said Knitting Mill Company, signed and delivered said deed was before and at the time a director of the Peninsula Bank of Williamsburg, Virginia, and that said bank had actual notice of the rights of your petitioner specified in Exhibit "A" filed herewith.

Your petitioner charges that the Virginia Trust Company, trustee, in writing duly signed, sealed, attested, acknowledged, approved of and consented to, all of the terms and conditions specified and set out in said Exhibit "A" filed herewith. And petitioner here files said written approval and consent, marked Exhibit "B" and prays the same to be read and considered as part of this petition.

Your petitioner is informed and charges that the said Williamsburg Knitting Mill Company on its own petition in this Honorable Court was declared a voluntary bankrupt, and J. B. C. Spencer and H. N. Phillips, were appointed receivers to take charge of the assets of said bankrupt; that the proceedings in bankruptcy are now pending before John Locke, referee; that a meeting of creditors has been had and the said J. B. Spencer and H. N. Phillips and W. T. Cooke been appointed trustees.

Your petitioner is informed, believes and charges that (5) in the schedule of liabilities of said bankrupt no mention is made of the claim due your petitioner, but in Schedule

B, 2 of incumbrances on bankrupt's real estate this language is used, viz.: "Also an agreement 25, August, 1909, retaining title to Sprinkler System."

Now your petitioner is advised that the said sprinkler system and equipment set up and installed in the said building and plant of said bankrupt, forms no part of said bankrupt's assets, but it is the property of your petitioner.

To the end, therefore, that the rights of your petitioner may be adjudicated in the premises, he prays that he may file this his petition in said proceedings in bankruptcy; that said J. B. C. Spencer, H. N. Phillips, W. T. Cooke, trustees, and The Peninsula Bank of Williamsburg, Virginia, and all other proper and necessary parties be made parties defendants to, and required to answer the same, but not under oath, oath being hereby expressly waived; that in the event of an order for sale of the bankrupt's plant, your petitioner's said property be not included, or if included the said balance of six thousand three hundred and nine (\$6,309.00) dollars due and owing to your petitioner be paid him out of the first money arising from such sale.

That your petitioner may be authorized by order of this Honorable Court, to enter on the said plant and premises and take and remove therefrom the said sprinkler system and equipment; that all proper process issue, and generally that your petitioner may have such other, further, full and general relief as the nature of his case may require and to the court may seem right, lawful and just.

And your petitioner will ever pray and etc.

GEO. H. HOLT,
By Counsel.

R. T. ARMISTEAD,
Of Counsel.

**EXHIBIT "A" WITH PETITION OF GEORGE H. HOLT
& CO.**

(6) Filed September 26th, 1910.

A Copy.

This agreement made in duplicate this 25th day of August, A. D., 1909, by and between Geo. H. Holt & Co., of the City of Chicago, and State of Illinois, party of the first part, and Williamsburg Knitting Mill Co., a corporation organized and existing under and by virtue of the laws of the State of Virginia, party of the second part, Witnesseth:

That for and in consideration of the mutual covenants and agreements hereinafter contained to be performed by the respective parties hereto, the party of the first part agrees to procure the installation in the plant of the party of the second part at Williamsburg, Virginia, of a complete automatic sprinkler system, the labor and materials of which are to be in accordance with the provisions of the specifications hereto attached, marked Exhibit "A" and made a part hereof, all to be furnished and performed at the cost and expense of the party of the first part, except as otherwise provided in said specifications, the location of the premises on which the said plant is situated being more particularly described as on the north side of Wise street, in the City of Williamsburg, Virginia, and consisting of main mill, office, card and spinning room building, picker house, mixing room, washer and dry room, boiler room, and engine room.

The parties hereto further agree that (except as to any work which is to be installed by the party of the second part) the said sprinkler system and equipment shall be installed by, and on the sole responsibility of General Fire Extinguisher Co., that the work shall be commenced promptly and continued to completion, contingent upon strikes, fires, accidents, delays of carriers, and all other causes beyond the control of the party of the first part, and that said equipment shall be in conformity with plans to be approved by South Eastern Underwriters' Association.

If, at any time prior to the completion of the equipment the work thereon be discontinued on account of fire, or for any cause other than the fault of the party of the first part, there shall be immediately due and payable from the party of the second part to the party of the first part a sum equal to the value of the materials furnished and labor performed up to and at the time of discontinuance.

The party of the second part agrees to furnish the necessary space and facilities for handling the materials and for the prosecution of the work and is to furnish as soon as called for by the party of the first part, or by general Fire Extinguisher Company, any additional work or apparatus which may be required but not included in the specifications hereto attached as a part of the equipment to be furnished by or on behalf of the party of the first part.

It is agreed that the said sprinkler system and equipment shall become, be and remain the property of the party of the first part until the title thereto is acquired by the party of the second part as hereinafter provided, and that said system equipment, shall, during the period of the agreement herein provided, be, and be considered as, personal property and not a part of the realty.

The party of the second part on behalf of itself, its successors and assigns does hereby agree to pay in cash to the party of the first part for said sprinkler system and equipment as follows: The sum of twenty-one hundred and three dollars (\$2,103.00) will be paid by the party of the second part to the party of the first part immediately upon completion of the equipment, or upon the new rate becoming effective on account of said equipment, whichever of such events shall (8) first occur, and the remainder of said purchase price shall be paid in three (3) deferred annual installments, each of which shall be for an amount equal to the first payment as above provided, and said deferred installments shall be paid respectively on the successive anniversaries of the date of the first payment beginning with the first.

Any variation in the contract prices specified herein shall be adjusted in the first payment.

Upon receipt by the party of the first part of the payment of the aggregate amount of the installments as hereinbefore provided, the party of the first part agrees to execute and deliver to the party of the second part, a bill of sale or other such instrument as may be necessary, conveying the said sprinkler system and equipment to the party of the second part, it being further understood and agreed that in the event of the failure of the party of the second part to pay the installments as herein provided, or to carry out or fulfill any other of the conditions of this agreement, said party of the first part will have the right, in addition to any and all other rights belonging or accruing to the party of the first part in such event, to take out and remove said equipment (and the party of the first part, its representatives or assigns, is hereby given the right, in any such case, to enter the premises for such purpose) and to declare the full amount of the unpaid installments as provided for herein to be immediately due and payable and to sue for and collect the same; provided, that in the event of such full amount being paid the party of the first part within five days from the date of any such default, the right to remove such equipment shall be waived by the party of the first part; and it is further understood and agreed that neither the discontinuance of ownership or operation of said plant or premises (9) by the party of the second part, nor any damage to or destruction of the same, or to said equipment, from any cause, shall operate to terminate or effect the liability of the party of the second part to this contract, except in so far as such liability may be satisfied by any insurance actually collected by the party of the first part and which may be applied by it in reduction or discharge of the unpaid installments.

It is further understood and agreed that the party of the second part shall have the privilege of purchasing said equip-

ment for cash at any time during the period of this agreement by paying to the party of the first part a sum equal to the aggregate amount of the installments then remaining unpaid less the unearned interest included therein at the rate of 6% per annum, and it is further agreed that, prior to any sale, incumbrance or other conveyance or disposition of the plant or premises, the party of the second part will purchase said equipment by paying to the party of the first part in cash the amount that would then be payable for cash purchase as provided herein.

And the party of the second part agrees to maintain fire insurance on the buildings and contents comprising the plant to be equipped to at least 80% of the insurable value thereof, and to keep said sprinkler system and equipment in good working order after the completion thereof and during the term of the agreement herein provided, or in the event of its failure so to do, the party of the first part may, at its option, do what is reasonably necessary for that purpose and the expense of same, with interest at the rate of 6% per annum, shall be added to and paid by the party of the second part with the next payment thereafter falling due. The party of the second part further agrees to insure the said sprinkler equipment, and (10) the materials therefor, against loss or damage by fire, lightning and windstorm, both during construction and also during the period of this agreement, for an amount equal to the fair cash value of said equipment, and materials, such insurance to be at the expense of the party of the second part, and to be in companies approved by, and under policies satisfactory to, and to be held by, the party of the first part, such policies to be in the names of the parties hereto as their interests may appear, with provision that loss shall be adjusted with, and payable to, the party of the first part for benefit of both parties hereto. It is further agreed by the party of the second part that it will have a clause inserted in the policies covering the buildings and equipment of its plant, reciting that none of the sprinkler equipment is insured thereunder, and that it will immediately notify the party of the first part of any loss or damage to said plant or equipment.

The party of the second part agrees as a special condition of this contract that it is the sole and unconditional owner of the land, buildings and contents comprising the plant to be equipped (the real estate being held by fee simple title,) subject to no conditions, incumbrances or liens of any kind, excepting a trust deed and mortgage to Virginia Trust Company, trustee, to secure a bonded indebtedness of \$18,000, and the party of the second part agrees to obtain and deliver to the party of the first part the written consent of the said Virginia Trust Company, trustee, to this contract, and its acquiescence in its

terms and conditions; the party of the second part further agrees to obtain and deliver to the party of the first part, upon signing this agreement, an opinion or certificate of its title and ownership of said property signed by an attorney who has examined the same and is familiar therewith; and the party of the second part further agrees to protect and indemnify the (11) party of the first part against purchasers without notice, creditors, lienholders and all others, and agrees that no sale, mortgage or other disposition or incumbrance of the buildings, plant or premises, nor any act or transaction that may affect the title, ownership or interest of the party of the second part in or to said property shall occur or be negotiated without reasonable prior written notice from the party of the second part to the party of the first part.

The party of the second part agrees to execute and deliver to the party of the first part its promissory notes for the deferred payments provided for in this contract upon completion of the equipment as agreed and such notes shall recite that they are payable in accordance with the terms of this contract; but it is understood and agreed that the party of the second part shall not be entitled to, and shall not receive or acquire, the title to and ownership of the said equipment until payment of the full amount of the principal evidenced by said notes, and interest after maturity.

This contract will be completed when signed by the parties hereto and approved by the proprietor of party of the first part at its home office at Chicago, Illinois, and when so completed, will be binding upon and will inure to the heirs, executors, administrators, successors and assigns of the parties hereto.

In witness whereof the party of the second part has caused these presents to be signed by its duly authorized officers and its corporate seal to be attached, and the party of the first part has subscribed the same by E. W. Fisher, its duly authorized agent, on the day and year first above written.

(Signed) GEO. H. HOLT & CO.,

Party of the first part.

By E. W. FISHER,

[Corporate Seal]

(Signed) WILLIAMSBURG KNITTING MILL CO.

Party of the second part.

By H. S. BIRD, President.

Attest:

(Signed) J. J. HENNESSEY, Secretary.

STATE OF ILLINOIS, }
County of Cook, } ss: .

(12) I, William Mathieson, a notary public in and for the County and State aforesaid, do hereby certify that E. W. Fisher, who is personally known to me to be the same person whose name is subscribed above on behalf of Geo. H. Holt & Co., appeared before me this day in person and stated that he executed the above and foregoing instrument as his free and voluntary act and deed, and as the free and voluntary act and deed of said Geo. H. Holt & Co., for the uses and purposes therein set forth.

Given under my hand and notarial seal this 26th day of August, A. D., 1909.

(Signed) WILLIAM MATHIESEN,
[Notary Seal] Notary Public.

STATE OF VIRGINIA, }
County of James City, } ss:

I, B. D. Peachy, a notary public in and for the aforesaid, do hereby certify that H. S. Bird and J. J. Hennessy, who are each personally known to me to be the same persons whose names are subscribed above as president and secretary, respectively, of Williamsburg Knitting Mill Co., appeared before me this day in person and states that they are the president and secretary, respectively, of said company and that they executed the above and foregoing instrument as their free and voluntary act and deed and as the free and voluntary act of said company for the uses and purposes therein set forth.

Given under my hand and seal this 14th day of October, 1909.

(Signed) B. D. PEACHY,
[Notary Seal] Notary Public.
My commission expires on the 31st day of Aug., 1911.

SPECIFICATIONS FOR AUTOMATIC SPRINKLER EQUIPMENT.

(13) We propose to furnish and erect in your main mill, office, card and spinning room building, picker house, mixing room, washer and dry room, boiler room and engine room, a wet pipe system of 656 Improved Grinnell Glass Disc Automatic Sprinklers, should more or less than 656 be required, we will adjust any variation at \$3.00 per sprinkler.

Our work in the buildings proper will start without main upright supply pipes, one located in main mill, one in card

and spinning room building, and one in engine room, from these main upright supply pipes, we will extend the system throughout the different portions of the building as may be required.

In each of the main upright supply pipes mentioned above, we will furnish and install a Variable Pressure Alarm Valve.

Connected with each Variable Pressure Alarm Valve, we will furnish and install on the outside of building a Water Motor Alarm Gong.

The water supplies to the system will be from a 50,000 gallon gravity tank to be erected close to the wall of the boiler and engine room and at a point about opposite the center of same, and from the present 20,000 gallon gravity tank now located near picker house.

In connection with the above specified work, we also propose to install a system of water supply piping and hydrant protection as follows: Starting at the bottom of each tank, we will drop to the ground with 8" and 6" W. pipe. In the drop pipe from each tank we will place an O. S. & Y. Gate Valve and a 2" drain connection.

At point where drop pipes from tanks enter ground we will connect 8" and 6" C. I. pipe, and from these points run (14) lines of 6" and 4" C. I. pipe to and connect with two 2-way l. g. n. hydrants to be located at points shown on plan, with the present hydrant now located near picker house, and with the main upright supply pipes mentioned above. Each of these supply pipes will be controlled by a Post Indicator Valve, located at proper distance from building.

Each supply pipe from tanks will be controlled by a post Indicator Valve and a By-pass check valve.

We will place independent gates on the nozzles of the present hydrant located near picker house.

We will make an overflow connection from the top of each tank.

From the outlet of your boiler feed pump and a connection to boiler, we will run a combination filling and heating pipe to each tank. The supply and filling pipes for the new and the present tank will be covered from the ground to a point where they enter tank.

The combination heating and filling pipe for tanks will be covered with Wyckoff covering where it runs underground.

We will leave plugged outlets in the underground piping for future extensions and an outlet for future pump connection.

We will furnish and erect a 50,000 gallon steel tank on a 75 ft. steel tower complete with tell-tale, ladder and covering for riser.

All of the underground piping and connections are clearly shown on blue print of the General Fire Extinguishers Co., dated October 31, 1908.

If underground pipes cannot be laid as shown on plan, owners to pay for extra material and labor necessary on account of any change.

All of the underground work unless otherwise specified, will be of cast iron socket pipe, with joints properly yamed, (15) run with hot lead and thoroughly caulked.

All of the material entering into the work to be of the best quality and to be erected in a thorough and workmanlike manner.

We deliver all of the above described material f. o. b. the railroad station, and pay traveling time and expenses of our men while erecting the work.

Owners to do all necessary trench work, carpenter and mason work, and cartage and handling of material at Williamsburg, Virginia. Also furnish foundations for the 50,000 gallon tank, tell-tale for the present 20,000 gallon tank, and box risers from present tank to prevent freezing.

Respectfully submitted,

GEO. H. HOLT & CO.

Williamsburg, Virginia, October 14th, 1909.

In consideration of one dollar (\$1.00), the receipt of which is hereby acknowledged, and of other good and valuable considerations, including the execution by Geo. H. Holt & Co., of Chicago, Illinois, of the attached and foregoing contract between the said Geo. H. Holt & Co., and the Williamsburg Knitting Mill Co., dated August 25th, 1909. I hereby personally guarantee the prompt and full performance by the said Williamsburg Knitting Mill Co., of all the covenants, agreements, undertakings and conditions by the said company to be kept and performed under and in accordance with the provisions of said contract; and I further agree to personally endorse and guarantee the payment of any and all promissory notes or other instruments for the payment of money given by the said Williamsburg Knitting Mill Company under and (16) in pursuance to the terms of said contract.

And I further state that I am worth not less than the sum of \$18,000.00 over and above all indebtedness and liabilities, and that I am the sole owner of 600 shares of the capital stock of the said Williamsburg Knitting Mills Company, the statements in this agreement being made to procure the exe-

cution of the above mentioned contract, and the acceptance of this agreement by said Geo. H. Holt & Co.

(Signed) H. S. BIRD, [Seal]

STATE OF VIRGINIA, }
County of James City. } ss:

I, B. D. Peachy, a notary public in and for the county and State aforesaid, do hereby certify that, H. S. Bird, who is personally known to me to be the same person whose name is subscribed to the above and foregoing instrument, appeared before me this day in person and stated that he executed the said instrument as his own free act and deed and for the uses and purposes therein set forth.

Given under my hand and notarial seal this 14th day of October, A. D., 1909.

(Signed) B. D. PEACHY,
Notary Public.

[Notary Seal]

My commission will expire on the 31st day of August, 1911.

**EXHIBIT "B" WITH PETITION OF GEORGE H. HOLT,
TRADING AS GEORGE H. HOLT AND COMPANY.**

Filed September 26th, 1910.

A Copy.

Williamsburg, Virginia, June 3, 1909.

Whereas the undersigned Virginia Trust Company is the duly appointed, qualified and acting trustee for the holders of bonds heretofore issued by Williamsburg Knitting Mill Co. secured by a trust deed or a mortgage to the undersigned conveying the property of said Williamsburg Knitting Mill Co. (17) situate on the north side of Wise street in the City of Williamsburg, Virginia; and

Whereas the said Williamsburg Knitting Mill Co. has signed a contract with Geo. H. Holt & Co., of Chicago, Illinois, dated August 25th, 1909, and providing for the installation of an Automatic Sprinkler System and Equipment in the plant of said Williamsburg Knitting Mill Co. on premises as above described, such contract including among other provisions, provision for payment for said equipment installments, and declaring that the title to and ownership of said equipment shall remain in said Geo. H. Holt & Co. until all of said

installments are paid, and that, in case of default, the said equipment may be removed by the said Geo. H. Holt & Co.;

Now, therefore, the undersigned Virginia Trust Company as trustee for the bondholders as aforesaid, does hereby approve of and consent to all of the terms and conditions of said contract, including those provisions relating to the rights of the said Geo. H. Holt & Co. in case of default on the part of Williamsburg Knitting Mill Co. with respect to the making of payments under such contract or complying with or fulfilling any other of its terms and conditions.

Executed this 11th day of October, 1909.

(Signed) VIRGINIA TRUST COMPANY, Trustee,

By JAMES N. BOYD, President.

[Va. Trust Company Seal]

Attest:

(Signed) L. D. AYLETT, Secretary.

STATE OF VIRGINIA, }
City of Richmond, } to-wit:

Acknowledged before me this 11th day of October, 1909.

(Signed) JNO. H. SOUTHALL,

Notary Public.

My commission expires Feb. 26, 1910.

**ANSWER OF NORVELL L. HENLEY, TRUSTEE, TO
PETITION OF GEORGE H. HOLT AND COMPANY.**

(18) Filed January 3rd, 1911.

VIRGINIA:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

In the matter of
Williamsburg Knitting Mill Co., Inc., } In Bankruptcy.
Bankrupt. } #1060.

The answer of Norvell L. Henley, trustee, to a petition filed herein against him and others by George H. Holt & Co. on the 26 day of September, 1910.

This respondent, reserving to himself the benefit of all just exceptions to said petition, for answer to so much thereof as he is advised it is material he should answer, answers and says that it is true that he is trustee in the deed of trust executed by the Williamsburg Knitting Mill Company on the 23d day of November, 1909, conveying its plant for the purpose of securing certain notes to the Peninsula Bank of Williamsburg, Virginia, for the payment of \$12,000, but this respondent denies that the said property was conveyed to this respondent as set forth in said petition.

This respondent had no knowledge, actual or otherwise, of any claim of the said bankrupt, and the said deed of trust was made to this respondent without any notice of any prior claim, actual, constructive or otherwise, except the mortgage to the Virginia Trust Company, in said petition mentioned.

And now having fully answered, this respondent prays to be hence dismissed, with his reasonable costs by him in this behalf expended.

NORVELL L. HENLEY, Trustee.

HENLEY & HENLEY, p. d.

**ANSWER OF H. N. PHILLIPS, J. B. C. SPENCER AND
WILLOUGHBY T. COOKE, TRUSTEES IN BANK-
RUPTCY, TO PETITION OF GEORGE H.
HOLT AND COMPANY.**

(19)

Filed January 3rd, 1911.

VIRGINIA:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

In the matter of	}	In Bankruptcy. #1060.
Williamsburg Knitting Mill Co., Inc.,		
Bankrupt.		

The answer of H. N. Phillips, J. B. C. Spencer, and Willoughby T. Cooke, trustees in bankruptcy, to a petition filed herein by George H. Holt and Company on the 26th day of September, 1910.

These respondents, without waiving their demurrer filed herein but insisting upon the same, and reserving to themselves the benefit of all just exceptions to said petition, for answer

to so much of said petition as they are advised it is material they should answer, answer and say,

That they believe it to be true that the petitioners, George H. Holt & Co., installed in the plant of this bankrupt, in the fall of 1909 and spring of 1910, an automatic sprinkler system and equipment.

That they neither deny nor affirm that the contract set out in Exhibit "A," filed with said petition, was entered into between the said petitioners and the Williamsburg Knitting Mill Co., but that hereby charge that no record of such agreement appears on the books of said bankrupt.

That it is true that the said Williamsburg Knitting Mill Co. executed to Norvell L. Henley, trustee, the deed of trust referred to, in order to secure the Peninsula Bank the payment (20) of over \$10,000.00, but they can neither affirm nor deny that said bank had actual notice of the alleged rights of petitioner.

And for further answer to said petition, your respondents answer and say that the said sprinkler system so installed as aforesaid, was annexed to and constituted a part of the real estate of said bankrupt, at and before your respondents took charge of said bankrupt's estate.

That said sprinkler system was in the custody of said bankrupt at the time your petitioners took charge of said estate, and that no deed of trust, memorandum of contract reserving title, or other lien then appeared, or now appears of record in the Clerk's office of the Circuit Court of the City of Williamsburg and County of James City, where said property is located, and that your respondents took charge of said estate without any knowledge, actual or constructive, of any alleged rights of said petitioners.

And your respondents are advised that the title, as well as the possession of the said property is in them, with full rights to dispose of and convey the same; or at the least, that there is a lien upon the said property, to the extent of all of the unsecured debts of the bankrupt, which have been or shall be proven in this proceeding, which lien is paramount to any claim or right of the said petitioners in and to said property.

Your respondents are further advised and charge that the said sprinkler system equipment is of little value apart from its value as a part of the said Knitting Mill plant, and should be disposed of along with and as a part of the said plant.

Wherefore respondents ask that the prayer of the petition be denied, and that the said property may be sold as a part of the real estate of the bankrupt, and the proceeds applied to (21) the payment of the general or unsecured debts of the bankrupt.

And now having fully answered, your respondents pray hence to be dismissed, with their reasonable costs by them in this behalf expended.

H. N. PHILLIPS,
J. B. C. SPENCER,
WILLOUGHBY T. COOKE,
By Counsel.

O. D. BATCHELOR,
HENLEY & HENLEY,
Counsel for Trustees.

**ANSWER OF PENINSULA BANK OF WILLIAMSBURG,
VIRGINIA, TO PETITION OF GEORGE H. HOLT
AND COMPANY.**

Filed January 3rd, 1911.

VIRGINIA:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

In the matter of
Williamsburg Knitting Mill Co., Inc., } In Bankruptcy.
Bankrupt. } #1060.

The answer of The Peninsula Bank of Williamsburg, Virginia, a corporation created by and existing under the laws of the State of Virginia, to a petition filed herein, against it and others by George H. Holt & Co. on the 26 day of September, 1910.

This respondent, reserving to itself the benefit of all just exceptions to said petition, for answer to so much thereof as it is advised it is material to answer, answers and says, that it is not true, as set out in said petition, that this respondent (22) had actual notice of the rights of the said petitioner, but, on the contrary, this respondent avers and charges that it had no notice, actual, constructive or otherwise. And respondent says that before it made the loan mentioned in said petition, it caused the title to the property of the said Williamsburg Knitting Mill Company to be examined by competent counsel, and that said property was free from any lien whatsoever except the mortgage to the Virginia Trust Company.

And now having fully answered, your respondent prays to be hence dismissed, with its reasonable costs by it in this behalf expended.

THE PENINSULA BANK OF WILLIAMSBURG, VA.

By Counsel.

HENLEY & HENLEY, p. d.

**ORDER FILING PETITION OF GEORGE H. HOLT AND
COMPANY AND REFERRING SAME TO REFEREE
LOCKE.**

Entered and filed September 26th, 1910.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF VIRGINIA.

In the matter of
Williamsburg Knitting Mill Co. } In Bankruptcy.
Incorporated, Bankrupt.

On motion George H. Holt, a broker, doing business under the firm name of George H. Holt and Company, leave is given him to file his petition, dated September 23rd, 1910, praying to be admitted a party plaintiff in this cause, and said petition is accordingly filed.

And it appearing from said petition that the said George (23) H. Holt & Co. claims certain machinery put up in the plant of said Williamsburg Knitting Mill Co. at Williamsburg, Va., it is ordered that this petition be referred to John Lock, referee in bankruptcy, who is directed and required to take testimony and report to this court as to the rights of the respective parties, first giving due notice of the time and place of making such enquiries to the receivers and trustees herein and to the trustees under the two recorded liens on said plant.

EDMUND WADDILL, JR.,
U. S. Dist. Judge.

Richmond, Va., Sept. 26th, 1910.

**ORDER AND FINDING OF REFEREE LOOKE ON
PETITION OF GEORGE H. HOLT & CO.**

Filed May 8th, 1911.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

In the matter of
Williamsburg Knitting Mill Company, } In Bankruptcy.
Bankrupt. } #1060.

Pursuant to an order entered in the above-entitled matter on the 26th day of September, 1910, the undersigned referee in bankruptcy, to whom was referred the petition of Geo. H. Holt & Company, filed on the 26th day of September, 1910, claiming a certain sprinkler system equipment installed in the mill plant of the bankrupt at Williamsburg, Virginia, ascertains and finds as follows:

This petitioner asserts a claim to the sprinkler system equipment which was sold by him to the bankrupt, and installed in its knitting mill plant at Williamsburg about one year (24) ago, insisting that he is entitled (a) to remove the equipment; (b) or to have its value ascertained and paid to him.

The right to recover the value of the property in amount is dependent upon the petitioner's title to the property itself; so that we need only consider the first ground of his claim, namely, that he is entitled to the possession and ownership of the sprinkler system equipment. The basis of this claim is a contract in writing, wherein and whereby petitioner reserved, or attempted to reserve, the title and right of possession until the purchase price was wholly paid, which has not been done,—the unpaid balance being \$6,309.00, with interest from the first day of March, 1910.

To the petition of Geo. H. Holt & Company answers denying the claim asserted were filed by the trustees in bankruptcy and the Peninsula Bank of Williamsburg, Virginia, a lien creditor, and Norvelle L. Henley, trustee in a deed of trust executed by the bankrupt for the benefit of the Peninsula Bank of Williamsburg, Virginia.

In the contract the following clause, reserving title until the full purchase price is paid, appears:

"It is agreed that the said sprinkler system and equipment shall become, be and remain the property of the party of the first part until the title thereto is acquired by the party

of the second part as hereinafter provided, and that the said system and equipment, shall, during the period of the agreement herein provided, be, and be considered as, personal property and not a part of the realty."

It also appears that the said contract was not, nor was any memorandum thereof ever docketed or recorded in the clerk's office of the Circuit Court of the city of Williamsburg, as required by section 2462 of the Code of Virginia, or in any other manner, and counsel for the trustees in *bankrupt* insist that the effect of the amendment of June 25, 1910, to subsection 2 of section 47 *a* of the bankrupt act is to make the (25) said reservation of title void as to them. In this view the referee concurs.

Status of the Peninsula Bank's Claim.

It appears that The Peninsula Bank of Williamsburg, Virginia, made a loan of twelve thousand dollars (\$12,000) to the bankrupt, and that on the 23rd day of November, 1909, the bankrupt executed a deed of trust to Norvelle L. Henley, trustee, to secure the loan referred to. Prior to this the contract between the bankrupt and Geo. H. Holt & Company for the installation of the sprinkler system equipment had been entered into, and notwithstanding the fact that Geo. H. Holt & Company had failed to docket a memorandum of his contract reserving title, as required under the laws of Virginia, he asserts that the said lien of the Peninsula Bank of Williamsburg, Virginia, does not attach to said sprinkler system equipment and apparatus; that it was not necessary to docket or record said contract as against the said deed of trust; that said Peninsula Bank of Williamsburg under said deed of trust acquired no title to said sprinkler system equipment or any part thereof, and that the said Peninsula Bank of Williamsburg, Virginia, had notice of his rights, and that, therefore, his lien is entitled to priority over that held by the Peninsula Bank of Williamsburg, Virginia.

The referee is of opinion that the lien of The Peninsula Bank of Williamsburg, under the deed of trust to Norvelle L. Henley, trustee, does attach to the sprinkler system equipment and to each part thereof, and that the said bank and said trustee had no notice or any knowledge whatever of the contract between Holt & Company and the bankrupt company, nor any claim asserted by Holt & Company until after the Williamsburg Knitting Mill Company filed its voluntary petition in bankruptcy.

And it is hereby ordered that Geo. H. Holt & Company is only a general creditor in the sum still due him under his

(26) said contract, to-wit, the sum of sixty-three hundred and nine (\$6,309) dollars, with interest from March 1, 1910, and that he can only prove his said claim as such; that he is not entitled to remove the sprinkler system equipment, or any part thereof, from the bankrupt premises, or to receive full payment therefor; that the said sprinkler system equipment is subject to the lien of The Peninsula Bank of Williamsburg, Virginia, under the deed of trust executed from the bankrupt to Norvelle L. Henley, trustee, dated November 23, 1909, under which there is a balance due of ten thousand (\$10,000.00) dollars, with interest from November 23rd, 1910.

To which order and finding of the referee the aforesaid petitioner, Geo. H. Holt, trading as Geo. H. Holt & Company, by his counsel, excepted.

JNO. B. LOCKE,

Referee in Bankruptcy.

Dated April 27, 1911.

PETITION FOR REVIEW OF GEORGE H. HOLT, TRADING AS GEORGE H. HOLT AND COMPANY, OF FINDINGS, OPINION AND ORDER OF REFEREE LOCKE.

Filed May 8th, 1911.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

In the matter of

Williamsburg Knitting Mills Company, } In Bankruptcy.
Bankrupt. } #1060.

To the Honorable John B. Locke, Referee in Bankruptcy:

George H. Holt, trading under the firm name and style of George H. Holt & Company, resident of the State of Illinois, (27) your petitioner herein, respectfully shows that in these proceedings it filed an intervening petition against the bankrupt, a corporation under the laws of the State of Virginia, residing at Williamsburg, James City County, Virginia, therein asserting a right to the possession of a certain sprinkler system equipment and apparatus, which, at the time of the commencement of these proceedings, was in charge of the bankrupt, and all of which was delivered to said bankrupt under and by virtue of a contract entered into with said bankrupt, dated on or about the 25th day of August, 1909, and executed by said bankrupt on or about October 14, 1909, the same being

more particularly described in the intervening petition filed herein and which said property is now in the possession of H. N. Phillips, J. B. C. Spencer and Willoughby T. Cooke, the trustees herein.

That on the 27th day of April, 1911, an order, finding and opinion, a copy of which is hereto annexed, marked Exhibit "A," and made a part hereof, was rendered by you and entered herein; that your petitioner at once excepted to such order, finding and opinion, and hereby again excepts to the same; that said order, finding and opinion, your petitioner respectfully represents and claims was and is erroneous in this, to-wit:

1. In that it finds that your petitioner is not the owner of the sprinkler system equipment and apparatus, delivered under the contract entered into between it and the bankrupt on the day above stated, and in the intervening petition described.

2. In that it finds that your petitioner is only a general creditor of the bankrupt to the amount remaining unpaid under the terms of such contract.

3. In that it finds that this petitioner is not entitled to remove the sprinkler system equipment or any part thereof, (28) from the bankrupt premises or to receive full payment therefor.

4. In that it finds that the claim of the Peninsula Bank of Williamsburg is a lien on the sprinkler system equipment and apparatus furnished by your petitioner under the contract made by your petitioner with the bankrupt aforesaid.

5. In that it finds that the Peninsula Bank of Williamsburg, Virginia, and N. L. Henley, trustee, had no notice or any knowledge whatever, of the contract between Holt & Company, and the bankrupt company, nor of the petitioner's reservation of title to the sprinkler system equipment and apparatus delivered to said bankrupt by your petitioner under the contract aforesaid.

6. In that it holds that the deed of trust dated the 23rd day of November, 1909, to N. L. Henley, trustee, securing the aforesaid Peninsula Bank of Williamsburg, Virginia, attaches to the said sprinkler system equipment and apparatus and to each part thereof, delivered to said bankrupt by your petitioner under the contract aforesaid.

7. In that it holds that the Peninsula Bank of Williamsburg, Virginia, under the deed of trust to N. L. Henley, trus-

tee, has a valid lien on the property of the bankrupt for ten thousand (\$10,000.00) dollars, with interest from November 1, 1910.

8. In that it finds that the sprinkler system equipment and apparatus and each part thereof, delivered by your petitioner under the contract made with said bankrupt, is subject to the claim of N. L. Henley, and to the claim of the Peninsula Bank of Williamsburg, Virginia, or to the claim of any creditor of the bankrupt.

9. In that the said order holds that the amendment of June 25, 1910, to subsection 2, of section 47a, of the Acts of Bankruptcy, is constitutional, and so construes said amendment (29) ment as to deprive this petitioner of the said sprinkler system equipment and apparatus and each part thereof, and this petitioner avers that, as so construed, the said amendment would be unconstitutional, because it would be in violation of the provisions of article V. of the amendments to the Constitution of the United States, and particularly to that portion thereof whereby it is provided that no person shall be deprived of his life, liberty, or property, without due process of law; and this petitioner avers that if the said construction be correct this petitioner would be deprived of his said property without due process of law.

10. In that the said order finds that the amendment of June 25, 1910, to subsection 2 of section 47a, of the Acts of Bankruptcy operates to deprive this petitioner of his property, while under the true construction of said amendment this petitioner would be entitled to said sprinkler system equipment and apparatus, and each part thereof, or to receive full payment therefor.

11. In that the said order holds that the amendment of June 25, 1910, to subsection 2, of section 47a, of the Acts of Bankruptcy is constitutional, and so construes said amendment as to deprive this petitioner of the said sprinkler system equipment and apparatus and each part thereof, and this petitioner avers that its said contract was executed by the bankrupt on October 14, 1909, and the said sprinkler system equipment and apparatus and each part thereof was installed before the enactment of said amendment, and, as so construed, the said amendment would be given a retroactive effect, which effect was not contemplated or intended by said Act, and is not within the meaning thereof.

12. In that your findings and order are against the weight of the evidence and contrary to law.

(30) 13. In that in other respects they are erroneous, which is apparent upon the face of the record.

Wherefore, your petitioner, feeling aggrieved because of such opinion, findings and order, prays that the papers, proceedings, orders, findings, opinions, evidence and transcript of the testimony herein, and the questions raised by this petition, may be certified to the District Court of the United States for the Eastern District of Virginia, the Honorable Edmund Waddill, judge presiding, and that the said findings and order may be reviewed in accordance with the statute and orders in such cases made and provided.

Dated this 28th day of April, 1911.

GEORGE H. HOLT & COMPANY,
By S. O. BLAND, Atty.

R. T. ARMISTEAD and
S. O. BLAND, Attys.

STATE OF VIRGINIA, }
City of Newport News, } to-wit:

S. O. Bland, being first duly sworn, deposes and says that he is the attorney for the said George H. Holt, trading as George H. Holt & Company, the petitioner herein, that the said petitioner is not a resident of the State of Virginia, and that the statements of fact in the foregoing petition for review are true according to the best of his information, knowledge and belief.

S. O. BLAND,

Sworn to before me and subscribed in my presence this 28th day of April, 1911.

JNO. B. LOCKE,
Referee in Bankruptcy.

**EXHIBIT "A" WITH PETITION OF GEORGE H. HOLT
& CO FOR REVIEW.**

(31)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

In the matter of	} In Bankruptcy.
Williamsburg Knitting Mill Company,	
Bankrupt.	

#1060.

Pursuant to an order entered in the above-entitled matter on the 26th day of September, 1910, the undersigned referee in bankruptcy, to whom was referred the petition of Geo. H. Holt & Company, filed on the 26th day of September, 1910, claiming a certain sprinkler system equipment installed in the mill plant of the bankrupt at Williamsburg, Virginia, ascertains and finds as follows:

This petitioner asserts a claim to the sprinkler system equipment which was sold by him to the bankrupt, and installed in its knitting mill plant at Williamsburg about one year (32) ago, insisting that he is entitled (a) to remove the equipment; (b) or to have its value ascertained and paid to him.

The right to recover the value of the property in amount is dependent upon the petitioner's title to the property itself; so that we need only consider the first ground of his claim, namely, that he is entitled to the possession and ownership of the sprinkler system equipment. The basis of this claim is a contract in writing, wherein and whereby petitioner reserved, or attempted to reserve, the title and right of possession until the purchase price was wholly paid, which has not been done,—the unpaid balance being \$6,309.00, with interest from the first day of March, 1910.

To the petition of Geo. H. Holt & Company answers denying the claim asserted were filed by the trustees in bankruptcy and the Peninsula Bank of Williamsburg, Virginia, a lien creditor, and Norvelle L. Henley, trustee in a deed of trust executed by the bankrupt for the benefit of the Peninsula Bank of Williamsburg, Virginia.

In the contract the following clause, reserving title until the full purchase price is paid, appears:

"It is agreed that the said sprinkler system and equipment shall become, be and remain the property of the party of the first part until the title thereto is acquired by the party of the second part as hereinafter provided, and that the said system and equipment, shall, during the period of the agree-

ment herein provided, be, and be considered as, personal property and not a part of the realty."

It also appears that the said contract was not, nor was any memorandum thereof ever docketed or recorded in the clerk's office of the Circuit Court of the city of Williamsburg, as required by section 2462 of the Code of Virginia, or in any other manner, and counsel for the trustees in bankruptcy insist that the effect of the amendment of June 25, 1910, to subsection 2 of section 47 *a* of the bankrupt act is to make the (33) said reservation of title void as to them. In this view the referee concurs.

Status of the Peninsula Bank's Claim.

It appears that The Peninsula Bank of Williamsburg, Virginia, made a loan of twelve thousand dollars (\$12,000) to the bankrupt, and that on the 23rd day of November, 1909, the bankrupt executed a deed of trust to Norvelle L. Henley, trustee, to secure the loan referred to. Prior to this the contract between the bankrupt and Geo. H. Holt & Company for the installation of the sprinkler system equipment had been entered into, and notwithstanding the fact that Geo. H. Holt & Company had failed to docket a memorandum of his contract reserving title, as required under the laws of Virginia, he asserts that the said lien of the Peninsula Bank of Williamsburg, Virginia, does not attach to said sprinkler system equipment and apparatus; that it was not necessary to docket or record said contract as against the said deed of trust; that said Peninsula Bank of Williamsburg under said deed of trust acquired no title to said sprinkler system equipment or any part thereof, and that the said Peninsula Bank of Williamsburg, Virginia, had notice of his rights, and that, therefore, his lien is entitled to priority over that held by the Peninsula Bank of Williamsburg, Virginia.

The referee is of opinion that the lien of The Peninsula Bank of Williamsburg, under the deed of trust to Norvelle L. Henley, trustee, does attach to the sprinkler system equipment and to each part thereof, and that the said bank and said trustee had no notice or any knowledge whatever of the contract between Holt & Company and the bankrupt company, nor any claim asserted by Holt & Company until after the Williamsburg Knitting Mill Company filed its voluntary petition in bankruptcy.

And it is hereby ordered that Geo. H. Holt & Company is only a general creditor in the sum still due him under his said contract, to-wit, the sum of sixty-three hundred and nine (\$6,309) dollars, with interest from March 1, 1910,

and that he can only prove his said claim as such; that he is not entitled to remove the sprinkler system equipment, or any part thereof, from the bankrupt premises, or to receive full payment therefor; that the said sprinkler system equipment is subject to the lien of The Peninsula Bank of Williamsburg, Virginia, under the deed of trust executed from the bankrupt to Norvelle L. Henley, trustee, dated November 23, 1909, under which there is a balance due of ten thousand (\$10,000.00) dollars, with interest from November 23rd, 1910.

To which order and finding of the referee the aforesaid petitioner, Geo. H. Holt, trading as Geo. H. Holt & Company, by his counsel, excepted.

JOHN B. LOCKE,

Referee in Bankruptcy.

Dated April 27, 1911.

**REFEREE'S FINDING OF FACT AND SUMMARY OF
EVIDENCE ON PETITION OF JOHN H. HOLT
AND COMPANY.**

(34)

Filed May 8th, 1911.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

In the matter of

Williamsburg Knitting Mill Company,	} In Bankruptcy.
Bankrupt.	

#1060.

To the Honorable Edmund Waddill, Jr., Judge of the United States District Court for the Eastern District of Virginia:

I, Jno. B. Locke, one of the referees of said court in bankruptcy to whom the above-entitled matter was referred, do hereby certify that, in the course of such proceedings had before me, an order, a copy of which is annexed to the petition referred to, was made and entered on the 27th day of April, 1911.

That on the 28th day of April, 1911, Geo. H. Holt, trading and conducting business under the firm name and style of Geo. H. Holt & Company, by his attorneys, R. T. Armistead and S. O. Bland, feeling aggrieved thereat, filed a petition for review. The filing of such petition for review was granted, and the summary of the evidence on which said order was based and the finding of facts herein are as follows:

It appears that on or about the 25th day of August, 1909, the Williamsburg Knitting Mill Company, a corporation, en-

tered into a contract with the said Geo. H. Holt & Company for the installation in its plant at the City of Williamsburg, Virginia, of a complete automatic sprinkler system equipment, consisting of automatic sprinklers, supply pipes, pressure alarm (35) and other valves, a 50,000-gallon tank, and a steel tower for the tank,—it being devised and designed for the purpose of extinguishing fire,—the same to be installed at the agreed price of eight thousand four hundred and twelve (\$8,412.00) dollars, which said contract was signed by the said Geo. H. Holt & Company and acknowledged on the 28th day of August, 1909, and by the bankrupt on the 14th day of October, 1909; that the installation of said system and equipment was begun about the first Monday in December, 1909, and completed about the latter part of March, 1910; that the contract made between the said Holt & Company and the said bankrupt was a conditional sales one, containing sales stipulations; that the ownership of said sprinkler system equipment furnished was to remain in the said Geo. H. Holt & Company until the same was fully paid for in cash, there being in said contract the following provision:

"It is agreed that the said sprinkler system and equipment shall become, be and remain the property of the party of the first part until the title thereto is acquired by the party of the second part, as hereinafter provided, and the said system and equipment shall, during the period of the agreement herein provided, be, and be considered as personal property and not a part of the realty."

The said contract also contains a provision whereby, upon receipt by the said Geo. H. Holt & Company, of the full payment of the sum of eight thousand four hundred and twelve (\$8,412.00) dollars, a bill of sale or other such instrument as might be necessary was to be executed by said Holt & Company, conveying said sprinkler system equipment to said bankrupt, with the further agreement that in the event of the failure of the bankrupt to pay the installments provided for in said contract, or to carry out or fulfill any other of the conditions of the agreement of said Holt & Company, in addition to any and all other rights belonging or accruing to said George H. Holt & Company the said Holt & Company, should have the right, in such event, to take out and remove said equipment, (36) with the right to enter upon the premises for that purpose; that said bankrupt was further given the privilege of purchasing said equipment for cash at any time during the period of the agreement by paying to the said Holt & Company the aggregate amount of installments then unpaid, less

unearned interest at six per cent.; that said contract required insurance with the loss payable to the said Holt & Company, for the benefit of both parties thereto, and said contract also contains the recital that "it is understood and agreed that the party of the second part" (bankrupt) "shall not be entitled to, and shall not recover or acquire the title to and ownership of the said equipment until payment of the full amount of the principal, evidenced by said notes and interest after maturity."

That said sprinkler system equipment was furnished and erected by Geo. H. Holt & Company, as agreed and that only a cash payment of two thousand dollars one hundred and three (\$2,103.00) dollars, of the purchase price has been paid thereon, leaving a balance of six thousand three hundred and nine (\$6,309.00) dollars with interest from March 1st, 1910, unpaid; that said sum has never been paid, and that said *conditional* contract of sale was not and never since has been filed for record, nor any memorandum as required by section 2462 of the Code of Virginia, docketed in the office of the clerk of the Circuit Court for the City of Williamsburg, or in the county of James City, Virginia, or in any other clerk's office; that on or about the 23rd day of November, 1909, the said bankrupt executed a deed of trust to Norvelle L. Henley, trustee, recorded in the clerk's office aforesaid, in Deed Book No. 5, pages 430, 431 and 432, whereby the said bankrupt conveyed unto the said trustee the following property, to-wit:

All that lot of land, with the building and improvements thereon, known as the Williamsburg Knitting Mill, situate in the city of Williamsburg, state of Virginia, and bounded as (37) follows: beginning at a point in the line dividing the land of the Chesapeake and Ohio Railway Company and that of the college of William and Mary, where the western line of Grigsby street would intersect said dividing line if extended; thence northerly at right angles to said dividing line and along the prolongation of the western line of Grigsby street one hundred and fifteen (115) feet to a point; thence at right angles westerly five hundred and forty (540) feet to a point; thence southwesterly along a stream bounding the land of the said Williamsburg Knitting Mill Company, on the west to the said dividing line between the land of the Williamsburg Knitting Mill Company and of the college of William and Mary; and thence easterly along said dividing line four hundred and ninety-five (495) feet to the point of beginning; the same being the lot of land conveyed to the said Williamsburg Knitting Mill Company by deed from the Chesapeake and Ohio Railway Company, dated August 1, 1900, and recorded in the clerk's office of the city of Williamsburg and county of James City, in Williamsburg Deed Book No. 3, pages 478-9, to which deed reference is here made.

Together with the engines, boilers, fixtures, machinery, and all other appliances and equipments constituting or in any wise whatsoever connected with the Williamsburg Knitting Mill Company plant, in and upon the premises hereby conveyed, or which may be acquired and placed upon the said premises during the continuance of this trust; it being the true intent and purpose of this deed to convey to the said trustee the entire plant of the Williamsburg Knitting Mill Company for the purposes hereinafter set forth.

The same being in trust to secure the sum of twelve thousand (\$12,000) dollars.

That of the twelve thousand (\$12,000) dollars, two thousand (\$2,000) dollars have been paid, leaving a balance of ten thousand (\$10,000) dollars; that at the time said sum of \$12,000.00 was loaned, a part of said loan was used in retiring notes aggregating a little over the sum of \$10,000.00 held by The Peninsula Bank of Williamsburg, beneficiary under the said deed of trust; twenty-five hundred (\$2,500.00) dollars of which was endorsed by L. F. Barnes; fifteen hundred (\$1,500.00) dollars of which was endorsed by E. W. Warburton; seven hundred and eighty (\$780.00) dollars of which was endorsed by Bozarth Bros.; one thousand (\$1,000) dollars of which was endorsed by H. S. Bird, and the sum of four thousand (\$4,000.00) dollars, approximately, secured by what was then termed warehouse receipts for goods stored in the Williamsburg Ware House Company; that L. F. Barnes declined to endorse any longer the papers which bore his endorsement unless the same were materially curtailed, which made it necessary for the Williamsburg Knitting Mill Company to secure funds to take care of that note, and while doing so that company needed additional funds for the mill for other purposes and negotiated for a sum sufficient to take care of these various needs.

That said sprinkler system equipment as installed consisted of a 50,000-gallon tank, erected on a steel tower, which was bolted to a concrete foundation, said concrete foundation have been erected for that purpose by the bankrupt, to which said tower was attached by "T" bolts inserted and the holes filled with concrete, and pipes run from the tank into the mill and bolted or screwed to the ceiling beams in the various rooms and workshops; that said tower, tank and foundation are on the outside of the building; that upon said tower there was a smaller tank used for the purpose of supplying the boilers of the plant and domestic uses of the mill, and the said smaller tank being attached to the bottom and sides of the upper tank; that said smaller tank was not furnished by Holt & Company; that the piping and well were not furnished by Holt

& Company; that the smaller tank can be detached without injury to the sprinkler equipment system; that a tank on a less substantial tower will supply the domestic purposes of the mill; that said smaller tank was furnished under an independent contract; that it was erected and installed by the sub-contractor of Holt & Company; that there was no other tank except the smaller tank referred to, to supply water for the boilers of said mill and domestic purposes, and that while the said tank could be detached easily from the said tower, in order to supply water for such purposes it would be necessary to erect another tower which would have to be of sufficient height to conduct water throughout the various parts of the building; that the tower as used was as necessary to support the smaller tank used (39) for domestic purposes as the larger tank used for the sprinkler system, except that, for the smaller tank, a less substantial and costly tower would have sufficed.

That the minutes of the said bankrupt show that in the years 1907, 1908 and 1909 H. N. Phillips was mentioned as a director of the Williamsburg Knitting Mill Company; that said Phillips had no knowledge of his election as a director of the bankrupt concern until the 25th day of September, 1909, on which day he was requested by the vice-president of the bankrupt corporation to attend a meeting of the directors of said bankrupt; that said Phillips attended said meeting, which was held in his bank on that date; that said Phillips was not a stockholder in said bankrupt corporation; that he acted as secretary of the meeting, at which H. S. Bird was elected president of the company, after the resignation of L. F. Barnes, and that said Phillips before said meeting disclaimed any knowledge that he was a director, and acted only upon the urgent request of the said Bird, and immediately thereafter resigned as such director, which resignation was then and there accepted; that no business was transacted at said meeting relative to the contract between the said bankrupt and Geo. H. Holt & Company, or the loan that was subsequently made by the Peninsula Bank of Williamsburg to the bankrupt; that H. N. Phillips has been cashier of the Peninsula Bank of Williamsburg since the year 1897; that Hugh S. Bird was, at the time of his election as president of the Williamsburg Knitting Mill Company and prior and subsequent thereto, to the time of said bankruptcy, a director in the Peninsula Bank of Williamsburg; that said Bird, when the application of the bankrupt was pending for the loan of \$12,000.00, was excused from voting on said loan; that neither the said H. N. Phillips nor the Peninsula Bank of Williamsburg had any knowledge of any contract existing between the bankrupt and Geo. H. Holt (40) & Company until after the petition in bankruptcy was filed; that the loan was approved by a committee consisting of

R. L. Spencer, the president of the bank, Norvelle L. Henley and E. W. Warburton, directors; that the Peninsula Bank was the bank through which the said bankrupt did its banking business; that before making the said loan the said bank caused the title to the property of the said bankrupt company to be examined; that the records in the Clerk's office of James City County and the city of Williamsburg, Virginia, as well as the minutes of the board of directors and stockholders of the Williamsburg Knitting Mill Company were examined, and that none of the said records contained any information relating to the contract of Holt & Company; that the title to the real estate and personal property of the said bankrupt company appeared from such examination to be free from lien, except the deed of trust to the Virginia Trust Company; that the application for such said loan of twelve thousand (\$12,000.00) dollars was made for the first time on October 26th, 1909, at which time a committee was appointed and such loan was considered from that time to November 19th, 1909, when it was approved by the committee, provided there was no lien against the property of the bankrupt except the deed of trust to the Virginia Trust Company, referred to; that the deed of trust followed on November 23rd, 1909; that when said application was being considered no mention was made to any of the committee, or any of the officers or directors of the said bank of the contract with Holt & Company; that the said Virginia Trust Company, as such trustee, waived, in writing, any claim it might have had upon the said sprinkler system equipment.

The questions presented on this review are:

1. Whether Geo. H. Holt & Company is the owner of or has a lien on the sprinkler equipment system so as aforesaid (41) furnished by him, by reason of his said conditional sale contract.

2. Whether the amendment of June 25, 1910, to subsection 2 of section 47a of the bankrupt act if construed so as to prevent the said Geo. H. Holt & Company from enjoying his alleged lien and reservation of title, is unconstitutional as violative of article V. of the amendments to the Constitution of the United States, and particularly that portion of said amendment whereby it is provided that no person shall be deprived of his life, liberty or property without due process of law.

4. Whether the said Peninsula Bank of Williamsburg, Virginia, and the said Norvelle L. Henly, trustee, have a lien upon the said sprinkler equipment system, or any part thereof by reason of said deed of trust dated November 23, 1909.

5. Whether the said George H. Holt & Company is merely a general creditor in the sum still due him under his said contract, to-wit, the sum of \$6,309.00, with interest from March 1st, 1910, and entitled only to prove his claim as such.

6. What standing have the general creditors in this case?

The court will see from the opinion of the referee filed herewith in this case the view the referee takes of the matter.

The referee files herewith, for the information of the court, the pleadings in this case, including the petition for review, order of the referee and a transcript of the testimony with all exhibits presented therein, and all other papers now on file with him, pertinent to this review.

And the said questions are certified to the judge for his opinion thereon.

JNO. B. LOCKE,

Dated May 3rd, 1911.

Referee in Bankruptcy.

**DEPOSITIONS OF BIRD, HENLEY, HENNESSY,
PHILLIPS AND SPENCER TAKEN BEFORE
REFeree.**

(42) Filed May 8th, 1911.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

In the matter of
Williamsburg Knitting Mill Company, } In Bankruptcy.
Bankrupt. #1060.

At Williamsburg, Virginia, in said district, on this 12th day of November, 1910, before John B. Locke, special master and referee in bankruptcy.

Pursuant to adjournment noted on the 2nd day of November, 1910, this hearing is now resumed.

Present: HENLEY & HENLEY, counsel for trustees in bankruptcy;

HENLEY & HENLEY, counsel for The Peninsula Bank and NORVELL L. HENLEY, trustee;

WILLIAMS & MULLEN, counsel for bankrupt;

R. T. ARMISTEAD, counsel for George H. Holt & Co., creditors;

H. N. PHILLIPS and J. B. C. SPENCER, trustees in bankruptcy.

HUGH S. BIRD, being duly sworn and examined at the time and place above mentioned herein, upon his oath, says:

By R. T. ARMISTEAD:

Q. The petitioner, George H. Holt & Co. joins in the demurrer and replies generally to the answer of the respondents heretofore filed in these proceedings.

Mr. Bird, look at this paper, which is a duplicate of a contract entered into between the Williamsburg Knitting Mill Co. and George H. Holt & Co., dated the 25th of August, 1909, (43) and please state, if you know, where the other duplicate of that is? A. I haven't seen it since it was executed. It was in the mill safe the last time I saw it. I had referred to it from time to time, and it was among the mill papers.

Q. State what are the functions and design of the machinery called the sprinkler,—automatic sprinkler, and other name for it? A. Sprinkler equipment.

Q. The sprinkler equipment mentioned and referred to in said contract. A. It is not machinery. It consists of a series of pipes, valves and such apparatus designed to automatically put out fire should such occur.

Q. Do I understand you then to describe it as simply a device for extinguishing fire? A. Yes.

Q. What is the effect upon insurance rates in buildings or plants where such a device is installed? A. It materially reduces the rate.

Q. Do you know what was the rate of insurance before, and what after the installment of this device in the Knitting Mill plant? A. It was \$1.95 per hundred before the installation, and 40¢ afterwards.

Q. This plant, then, I understand, profits in the rate of insurance as 40¢ is to \$1.95? A. Yes.

Q. I understand that the device is entirely an insurance scheme on the part of the plant? A. Entirely so.

Q. I have seen that on the ledger of the knitting mill company, as of date of November 23 or 24, 1909, there were notes aggregating a little over \$10,000 taken up. Who were (44) the holders, if you know, of those notes at that time? A. I have before me a transcript from the ledger, and have gone over it carefully and to the best of my recollection this agrees

with my recollection of the matter. The transactions on November 23 referred to are as follows:

Deposited Peninsula Bank, \$12,000	
Paid Peninsula Bank note,	1,500, endorsed by Bird & Barnes
" " " " "	2,500 " " " " "
" " Bank call loans,	1,098.22
" " " " "	1,887.70
" " " " "	1,599.64
" " Bank note,	1,000.
" " " " "	788.59, note deposited by Bozarth Bros. for collection

Total, \$10,374.15

Q. Were all these notes of the Williamsburg Knitting Mill Company to the Peninsula Bank, with the exception of \$788.59, given to cover the indebtedness of the knitting mill to the bank at Williamsburg?

N. L. HENLEY: Counsel for Peninsula Bank objects to the question upon the ground that it is immaterial as to whom the notes were payable to.

A. Yes.

Q. Do you know the date at which those notes were given?

N. L. HENLEY: Same objection.

A. Various dates; I remember no particular one.

Q. Have they matured at the time of this transaction? A. They were still alive at the time of the transaction; still good.

Q. Were they due and payable, is what I mean, or whether they were overdue?

N. L. HENLEY: Same objection.

A. Some of them were demand notes, some sixty days, some ninety days, but by debiting and crediting interest, they were all brought into one due date—that date.

Q. Do I understand you to mean they were notes that had (45) been given for previous indebtedness of the knitting mill to the bank at Williamsburg before they were taken up and paid? A. Yes.

Q. I note in the minute book of the proceedings of the knitting mill, held November 18, 1909, which I now hand you for reference, an action taken to convey the knitting mill plant,

machinery, etc., in trust to secure certain notes of the Peninsula Bank at Williamsburg. Does that proceeding refer to the deed by you afterwards executed on the 23rd of November, 1909, in trust to secure three notes, two of which were for \$1,000 each, and the third for \$10,000, each of which endorsed by yourself and Mrs. Bird, I believe, and payable to The Peninsula Bank of Williamsburg?

N. L. HENLEY: Counsel for Peninsula Bank excepts to the question, upon the ground that the record is the best evidence, and shows upon its face the intent and object of the resolution.

A. Yes.

Q. At the date of that deed, 23rd November, 1909, what progress, if any, had been made on the installation of this sprinkler equipment in the mill? A. Nothing had been done at all.

Q. Were you or not, at that time—I mean the execution of that deed—a director of the bank, the Peninsula Bank at Williamsburg? A. Yes.

Q. How long before the execution of that deed was the matter covered in the deed being negotiated? A. A very few days—perhaps two weeks.

Q. Was or not, in the course of that negotiation, the contemplated installation of this automatic sprinkler mentioned to the directors of the bank, and were they informed, through you, of the contract dated 25th August, which you had consummated with George H. Holt & Co.?

(46) N. L. HENLEY: The Peninsula Bank, by counsel, objects to the question upon the ground that it is immaterial, and upon the further ground that it is inadmissible, the contract referred to being in evidence, and the best evidence, and further upon the ground that the deed of trust referred to upon its face provides for the conveyance of all property then upon the premises, or to be afterwards constructed thereon.

A. They were informed of contemplated installation of sprinkler; they were not informed of the existence of any contract.

Q. Then the feature of installing this fire device in the knitting mill plant did enter into the negotiation for the loan of \$12,000 mentioned in the trust deed referred to?

N. L. HENLEY: Same objection as above, and upon the further ground that it is impossible for this witness to state what actuated the Peninsula Bank in making such loan.

A. It had been mentioned during the negotiations, but I have no recollection of its being discussed or considered by the bank, except possibly on the general ground that my policy in the mill was to continually improve the plant.

Q. I see in the minutes of the directors meetings of the Williamsburg Knitting Mill Co. held at the Peninsula Bank September, 1909, present H. N. Phillips and H. S. Bird, the former being elected secretary and the latter vice-president of the company, presiding. I show you the book. Was Mr. Phillips the vice-president of the company before that meeting, or was he made so at that time? A. He never was the vice-president of the company, and the record does not show it.

Mr. ARMISTEAD: Oh, yes, I see. I withdraw the question.

Q. It does appear, however, that Mr. H. N. Phillips acted as secretary of that meeting, does it not, and signed the (47) minutes of the meeting as such? A. It does.

Q. If you know, state please when the work on the installation of the sprinkler begun and when it was completed. A. It was begun the first Monday of December, 1909. It was completed I think the latter part of March, 1910.

Q. The notes given for the deferred payments for that work are dated the 1st of March, 1910, and under the contract they were not to be given until the completion of the work of installation. Aren't you, therefore mistaken as to the date of the completion of the work? A. I am not.

Q. Under the contract for the installation, was it or not the duty of the knitting mill company to provide certain earth works and foundations for the reception of this equipment, before the equipment was to be installed?

N. L. HENLEY: Counsel for the Peninsula Bank excepts to the question upon the ground that the contract is in writing and is the best and only evidence as to what the intent of the parties was.

R. T. ARMISTEAD: In reply to this objection,—the contract has attached to it, as a part of the contract, a schedule of the work to be done by the mill and by Holt & Co. and is filed along with the petition.

A. Yes; the concrete foundations to the tank were begun and completed sometime in the summer previously, at which time Holt was refusing to execute the contract which he afterwards did execute. Such foundations were passed upon by the proper inspector of the insurance company, and accepted

after Holt did made the contract as a fulfillment of his contract.

As a matter of fact, at the time of the actual building of the foundation, I thought all the negotiations with Holt were over, and was constructing them not with a view to a sprinkler equipment, but a view to the erection of a tank and tower which the mill very much needed.

(48) Q. The work then, which was adopted by Holt & Co. as a proper foundation, had been completed before the date of the mill's contract with Holt? A. The foundations were completed during that summer. I have no recollection of the date. Being cement work, it was done before frost.

Q. Did you as president, and representing the knitting mill company, advise with and use your influence with Holt & Company to withhold the contract of 25th August, 1908, from being put upon the record? A. I did not.

Q. Was there or not substituted for the recordation of that contract an offer to have endorsed by a bonding company the notes that were to be given for the deferred payments? A. There were negotiations contemplated,—some sort of suretyship; I don't remember the details.

Q. Is it or not a fact that you objected to the recordation of the contract, or the endorsement securing the endorsements of a bonding company to the notes, on the ground first that the recordation would impair the credit of the knitting mill, and the substitution of a bonded company's endorsement on the notes would necessitate a financial statement which would equally embarrass the credit of the mill? A. I have no recollection of the question of recordation being raised by any one, or suggested. As to suretyship, bonding companies, and the like, I tried to drive the best bargain I could, save all the fees I could, and withstand, as far as I could, Holt's many requests for all sorts and kinds of action, each entailing a fee, and judging from correspondence, all of them to go into the particular office in the Manhattan Building, Chicago, where Holt had his office. I noted in the correspondence with Holt that a great (49) many corporations seemed to inhabit the one office, and all the fees seemed practically to go to one person, and I thought there was a tendency to load up with extra charges, which had not been contemplated in the contract.

Q. Had you or not acceded to the proposition of the endorsement of these notes by a bonding company, and afterwards substituted another style of endorsement?

N. L. HENLEY: Counsel for trustees in bankruptcy object to this question and this line of examination, upon the ground that it is immaterial and encumbers the record with foreign matter.

A. All the negotiations with Holt amounted to a wrangle, in which nothing he proposed suited me, and nothing I proposed suited him. The compromise of the wrangle was the contract that is in evidence.

Q. Was or not Mr. H. N. Phillips a director of the Peninsula Bank of Williamsburg and cashier of the same bank at the same time that he signed the record of your directors' meeting as acting secretary? A. Yes.

Q. And was it not on his motion as a director of the knitting mill company that you were elected president of the company after the resignation of Mr. Barnes? A. Whatever the minutes say.

Q. I refer you to it, Mr. Bird. A. The minutes so state.

CROSS EXAMINATION.

Counsel for the Peninsula Bank and for the trustees in bankruptcy, without waiving any exceptions heretofore taken, and without waiving the demurrer filed by said trustees, proceed to cross examine this witness.

By Mr. N. L. HENLEY:

Q. Mr. Bird, is it or not a fact that a part of the sprinkler equipment consists of a steel tank and tower? A. Yes, it was (50) made so.

Q. Does not that tank and tower furnish the water supply for the mill? A. No. The water supply of the mill is in a tank which is on that tower, but separate.

Q. Was it constructed at the same time? A. It was, under two independent contracts.

Q. Prior to the construction of the sprinkler equipment, you had a tank and tower, did you not? A. I did.

Q. Was not that done away with after the new one was installed? A. It was.

Q. Then at least the tower is used for purposes other than fire extinguishing? A. It is.

Q. Did all of the water supply for the plant come from the smaller tank that you have spoken of as being on the new tower? A. It did.

Q. Holt & Company did not furnish the smaller tank, did they? A. They did not.

Q. Did they furnish the tower? A. They did.

Q. Did they furnish the well? A. No.

Q. Piping? A. No.

Q. Did they erect the tower and install the tanks? A. Their sub-contractor did.

(51) Q. If the smaller tank to which you have referred had been installed on a tower other than the one now used, so as to furnish the water necessary for the plant, what would have been the approximate cost? In other words, what relative portion or value would that part of the sprinkler equipment that furnishes water for the plant bear to the whole value of the sprinkling equipment? A. Practically all, or nearly all of the value in the tower for the sprinkler equipment was necessary for the tank for the operation of the mill; just a few feet of height at the top difference.

Q. Can you give us an approximate value, or the approximate cost of that portion of the tower that would have been necessary for the smaller tank? A. I never had the towers bid on separately, and don't know.

Q. A good many questions have been asked you about the notes aggregating \$10,374.15, which appear to have been paid on November 23, 1909. Did or not the consideration of the several notes go into the treasury of the knitting mill company, and were not the funds used by said company in the conduct of its business? A. Yes.

Q. I understand you to say that it was only incidentally mentioned by you to perhaps some of the directors of the Peninsula Bank that a sprinkler equipment was contemplated. Is that correct? A. Yes.

Q. Do you recall whether any such mention was made at any meeting of the Board of Directors of the Peninsula Bank? A. I do not.

Q. Do you recall ever having mentioned to any one of (52) the directors of the Peninsula Bank anything in connection with the contract with Holt & Company? A. I did not.

Q. And so far as you know, none of the officers of the Peninsula Bank had any notice, actual, constructive, or otherwise, of such contract on November 23, 1909?

R. T. ARMISTEAD: Objection by attorney for Holt & Co. that the question calls for a legal opinion and not an answer to a fact.

A. They did not.

Q. Several questions have been asked you about the recordination of the contract between the knitting mill and Holt. After the contract was executed, was it or not turned over to Mr. Holt,—a copy of it? A. The contract was executed in duplicate; the mill kept one and Holt had the other.

Q. Was there any way by which you could have prevented Holt & Co. from recording the contract, if they had seen fit to do so? A. No.

Q. It was a matter entirely under their control? A. So far as I know.

Q. You have stated that the notes given for the sprinkler equipment were dated March 1, 1910, and that the work was not completed until the latter part of March, 1910. State, if you can, why they were dated March 1, 1910, instead of upon the completion of the work as contemplated by the contract. A. As stated, the work was completed the latter part of March, 1910, and check went forward for one-fourth the cost of the equipment, less certain small deductions contemplated in the contract. Along with the check went the notes for the deferred payments, bearing same date as the check. The insurance companies were notified that conditions were (53) right for the operation of the lower 40¢ rate. The bill for insurance premiums had been in the office a little while, dated in February, and had not been paid because the completion of the sprinkler contract would lessen the amount of the bill, said amount being determined by that portion of the year in which the plant was protected by the sprinkler. The clerk of the stamping office, who has the decision in such matters, after having had it put up to him pretty strongly by me, that although the full protection which was to work the lower rate had not been completed until the latter part of March, the plant had been very much better protected during March than any preceding month, so the insurance people, in making their credit on the bill (on account of installation of sprinkler equipment), did it as if the equipment were completed the first of March. This coming to Holt's knowledge, because Holt and these insurance people seemed to be right close together, he returned the mill notes dated the latter part of March, and suggested that it was fair that, as we was getting the benefit of it during March, that he ought to have a similar benefit in the dating of the notes, but stated further that if I would do this, he would waive the question of a month's interest on the cash payment which went to him the latter part of March. It seemed fair to me, so I destroyed the notes dated the latter part of March, and sent him new notes dated the 1st of March, the operation of the same being to bring them to maturity practically a month earlier.

Q. It appears from the minutes of the directors of the knitting mill, which have been shown you, that Mr. H. N. Phillips was at one time a director. How many meetings did he attend? A. One.

Q. Was he a stockholder in the knitting mill? A. No.

(54) It is agreed by counsel for all parties that the deposition of Mr. H. S. Bird, taken on the 18th day of October, 1910,

in this matter, can be read in connection with the question raised on petition filed by Holt.

By R. E. HENLEY:

Q. Is it not a fact that the Peninsula Bank, before making the loan of \$12,000 secured in the deed of trust heretofore mentioned, caused you to have examined the title to its property?

A. Yes.

Q. Was that done? A. It was.

Q. Was an abstract of the title furnished the Peninsula Bank? A. Yes.

Q. Have you that original abstract? A. I presume the mill has it.

Q. I show you a paper purporting to be a copy of said abstract. Will you identify that as a true copy of the first abstract furnished the Peninsula Bank? A. So far as I know. I remember some corrections I made as to boundaries, and I see them incorporated here.

(Said copy of abstract is here filed, marked H. S. B. Exhibit "A.")

Q. The copy of the abstract which has just been filed shows liens upon certain machinery in the plant in favor of Tompkins Bros. and the Rodney Hunt Machine Company. Is it not a fact that before the Peninsula Bank made the loan above referred to, these liens were marked satisfied, and that a later abstract was furnished the bank, showing that fact? A. Yes.

Q. Can you identify this as a copy of that later abstract. (55) A. Yes.

(Said copy of abstract is here filed, marked H. S. B. Exhibit "B.")

RE-DIRECT EXAMINATION.

By R. T. ARMISTEAD:

Q. I show you record of stockholders minutes, and refer you to page 71, page 73, and to page 74, which include the minutes of meetings from the 31st of January, 1907, 1908 and 1909, inclusive. Does not that record show that each of these yearly elections of directors, H. N. Phillips was elected one of the directors of the knitting mill company? A. The record does show it.

Q. You have said that the \$12,000 gotten from the bank were used for the purposes of the mill, in your answer to one

of the questions in cross examination. Did not \$10,000 of that \$12,000 go to the extinguishment or taking up of \$10,000 of notes due the bank by the mill, previous to the receipt of this \$12,000?

N. L. HENLEY: Counsel for the Peninsula Bank and trustees in bankruptcy, object to the question, upon the ground that it has been fully answered, and upon the further ground that it is immaterial.

A. The \$12,000 was added to the then balance of the mill, and the ten thousand and odd dollars was paid out as previously testified.

Q. Didn't the mill take up the notes, amounting to about \$10,000 then due to the Peninsula Bank of Williamsburg? A. I have so previously stated.

Q. State if you can why, in making out the schedules of indebtedness of the mill property, you did not include in that schedule the notes you, as president of the mill company, had executed to George H. Holt & Company? A. As previously (56) and frequently stated, I did not make out the schedules. I was in very bad shape physically, and the mill's attorney and expert accountant made all the figures.

R. T. Armistead takes this occasion to state that he called this matter to the attention of Mr. Lewis C. Williams, of the absence in the schedules of the bank debts and this large indebtedness due to George H. Holt & Company, and his explanation was that it was one which happened by inadvertence; that it had been mentioned to him, and he thought until today that it was in the schedules.

And further this deponent saith not.

H. S. BIRD.

JOHN J. HENNESSY, being next duly sworn, and examined at the time and place first herein mentioned, upon his oath, says:

By R. T. ARMISTEAD:

Q. State what has been your business and occupation for the last seven years. A. I have been at office work; previous to that I had been at machine work.

Q. What positions, if any, did you hold at the Williamsburg Knitting Mill in the years 1909 and 1910? A. I was bookkeeper from July 13, 1909, to May 24, 1911.

Q. Were you not at one time superintendent of the mill, and if so, when? A. Well, I was practically the superintendent of the mill from the middle of November of last year until May 24th of this year, but without title until January 7th of this year.

Q. I note that you were, sometime in August, elected secretary of the Williamsburg Knitting Mill Company, and I see also that you signed the contract made by the Knitting Mill Company with Holt & Co. as secretary. You signed as secretary? A. Yes.

Q. Can you give me the date at which the work under that contract with Holt & Co. was commenced and completed? A. (57) No, without the letter file of the company, I could not tell.

Q. There is, then a letter file that would show the commencement and completion of that work? A. Yes.

Q. Where was that letter file? A. At the office of the knitting mill.

Q. Do I understand that by reference to that file, you can give the date of commencement and the completion of that work? A. Yes.

Q. Did or not the knitting mill company have to prepare the foundations to receive the work that Holt & Company contracted to do? A. Yes, the knitting mill had to lay the foundation.

Q. Mr. Bird has testified that that work was done sometime in the summer of 1909. Is it or not a fact that, on the completion of the foundation, the material was on hand and work commenced under the contract with Holt & Company? A. My impression is that before the foundation had been laid part of the tank was already here; and that the General Fire Extinguisher Company wrote us pretty sharply for not having finished the foundation in time, stating that we were holding some of their men down in North Carolina who were all ready to begin on the job; and I think the letter file will show that also.

Q. Then it is your impression that the work on the sprinkler equipment was commenced early in the fall of 1909? A. I don't know just as to that. I am not sure as to the dates.

Q. State the uses and functions of the sprinkler equipment. A. Entirely for fire purposes, as there was no provision made for a connection without commercial pipes at all.

Q. By commercial pipes, you mean the machinery for manufacturing? A. That is it.

Q. There has been testimony in this case of a tank erected upon the tower provided for this tank, and supplying the water for the sprinkler equipment. Has or not that smaller

tank any connection with the sprinkler equipment in its uses?
A. No, not in its uses.

Q. Is it or not a fact that the smaller tank is entirely separated from the tank that supplies the water for the sprinkler equipment? A. Well, one is really rivited into—I am not sure whether it is onto the tank or the legs of it. They are both on the same legs.

Q. Could the smaller tank, used for the manufacturing machinery, be detached from the other tank and tower without injuring it? A. Quite easily.

Q. You were there when both tanks were erected? A. I was.

Q. Mr. Bird has testified that the smaller tank was erected subsequently to the tank put up under the contract with Holt & Co. That is a fact, is it? A. Yes, the smallest tank came sometime later, but before the men had left the job; the workmen were still there; both tanks were not shipped at the same time.

Q. Could a tower less expensive than the one used answer all of the purposes of the smaller tank? A. Yes, much less expensive.

(59) Q. From your knowledge of machinery, could the smaller tank, which supplies the water for the machinery of the knitting mill plant, be detached from the tower on which it now rests and put within the space or inside of the space occupied by the tower that holds the sprinkler tank? A. Yes.

Q. The sprinkler attachment is entirely for the purposes of extinguishing fire, and not at all connected in its uses with the machinery for the plant? A. Yes.

R. E. HENLEY: Question objected to as leading, by counsel for trustees.

Q. Was the water in the sprinkler,—the tank that supplied the sprinkler, to be used at all for any machinery purposes of the plant? A. No, there was no connections by which it would be used.

Q. What would be the cost of lowering the smaller tank and putting it upon a tower sufficient to hold it there?

N. L. HENLEY: Question and this line of examination objected to by counsel for trustees, as calling for pure opinion of witness, as he has not qualified as an expert on this subject.

A. I am not sufficiently acquainted with prices on such items to give an answer to that question. It would not require anywhere near so large a construction as there is at present down there.

Q. The smaller tank, Mr. Bird has testified, was not at all a part of the sprinkler system. That is correct, is it not?
A. Yes.

Q. Did it require a tower as costly or as high for the (60) smaller tank as for the sprinkler tank?

N. L. HENLEY: Same objection.

A. Not so high by some feet; I don't know just how many, but I know not nearly so costly.

Q. Did not the knitting mill have a tank and a tower sufficient for their water supply to their machinery, before the erection of the sprinkler tank? A. It was sufficient while the tank was in good condition, but of late years it had been leaking, and water would leak out to such an extent it was sometimes useless.

Q. I understand you, though, to say that the water in the sprinkler tank has no connection with the machinery of the manufacturing part? A. None at all. As you understand, it did not at the time I left. I suppose it is the same yet.

Q. When did you leave there? A. May 27th, I believe it was.

Q. During the whole time that you were there, and up to the time that you left, was the tank erected for the sprinkler equipment used at all for the machinery purposes of the plant?
A. No.

Q. Now, Mr., during the erection of that tank, from the commencement of the work until its completion, could any one living in Williamsburg be oblivious to the fact that it was being erected?

R. E. HENLEY: Question objected to by counsel for trustees and Peninsula Bank, as calling for the opinion of witness, as he has not qualified as an expert on the sight or intelligence of the people in Williamsburg.

A. That is a hard question to answer. I suppose most of the town people walked down there to see it.

Q. Wasn't the work necessary to be performed in the erection of that tank and riveting it unusually noisy?

(61) R. E. HENLEY: Question objected to by counsel for Peninsula Bank, as witness has not qualified as an expert on noise.

A. Yes, for a town of this sort. In general I don't know just how to answer that question. I should say most every-

body in town knew that tank was being erected, but I don't know, of course, how many may not have known it.

Q. Was or not the noise made in the erection of that tank sufficient to attract the attention of any one passing at any point in the city of Williamsburg, to have been attracted by it,—any man of ordinary hearing?

R. E. HENLEY: Same objection.

A. So far as that goes, I don't know how far Williamsburg extends, but if you mean, mention certain distances here, I might be able to answer that question better.

Q. I'll say within a radius of four hundred yards. A. Yes, I would say yes.

Q. Would not any one passing within that radius be attracted by the noise made in the work.

R. E. HENLEY: Same objection.

A. Yes, when the men were riveting.

Q. Were they not riveting there for some time? A. Yes, several months I believe.

Q. Was or not the noise made in riveting unusual for the city of Williamsburg? A. Yes.

Q. You have said that you thought by reference to your letter files, you could fix the date when the work was commenced under the contract with George Holt & Co. and the knitting mill company. Will you go over to the office and inform yourself, and answer as to that date? A. (Later) Tank shipped October 15, 1909, (per bill and B/L R. D. Cole) Tank arrived before October 27 (Knitting mill letter Oct. 27 to Cole). Mason work on foundation begun Nov. 4 (Letter to Richardson) Work on foundation finished Nov. 6 (Letter to Richardson) Tank work begun November 29 (Letter to Cole); tank work finished Dec. 23 (Letter to Cole) Riser pipe not installed. Mar. 11, letter to Cole, tanks finished complete, tank half filled.

CROSS EXAMINATION.

By R. E. HENLEY:

Counsel for trustees and the Peninsula Bank, without waiving the demurrer or the exceptions heretofore taken, proceed to cross examine the witness.

Q. Does not the tower upon which the fire tank is placed also constitute a part of the sprinkler equipment? A. It is a part of the sprinkler equipment.

Q. It is a fact, as I believe you have stated, that the fire tank and the tank for commercial purposes, are both placed upon the same tower? A. Yes, the fire tank is placed uppermost and the smaller tank is attached to the bottom and sides of the upper tank.

Q. What is the nature of the foundation upon which this tower is constructed? A. Concrete foundation.

Q. How is the tower affixed to this foundation? A. By means of bolts, T bolts, inserted, and this hole filled in with concrete; two bolts to each leg; I believe it is two; I am not just certain.

Q. Then it is true, is it not, that the tower is stationary. A. Why, yes.

Q. Please explain in detail, if you can, how the sprinkler equipment, other than the tower and tank, is installed or affixed (63) ed in the plant of the company? A. Mostly attached to the main beams of the mill, with smaller pipes running crosswise containing the smaller sprinklers.

Q. Then do I understand you to say that all of this equipment, other than the tower, is affixed to some portion of the building? A. Yes; for the main part it is bolted or screwed in.

Q. You have testified as to what kind of tower would be required upon which to place a tank for commercial purposes. Is it or not a fact that such a tower would necessarily have to be as high or higher than the building? A. No, it would have to be—the bottom of the tank should be as low,—as high as the lowest place it feeds.

Q. What I want to know is, what place it feeds. A. There is quite a space in the building above the highest place. The commercial tank feeds within this space. It is necessary to have sprinkler service but no water for commercial purposes.

By the REFEREE:

Q. How are those tanks filled. A. With a pipe running above the tank and dropping through.

Q. Same pipe? A. I think a separate pipe for each tank. I am not just certain of that. It is just a matter of a few feet anyway.

And further this deponent saith not.

JOHN J. HENNESSY.

(64) H. N. PHILLIPS, who had been previously sworn, is here recalled, and testified as follows:

By N. L. HENLEY:

Q. What official position did you occupy with the Peninsula Bank prior to and on November 23, 1909. A. Cashier, and for some years, director.

Q. How long had you occupied the position of cashier? A. About fourteen years.

Q. What led to the loan evidenced by deed of trust of November 23, 1909, to the Williamsburg Knitting Mill Company? A. Largely, I think, through the fact that Mr. L. F. Barnes declined to endorse certain paper longer unless it was materially curtailed. That made it necessary for him (Bird) to secure funds to take care of that note, and while doing so, he needed additional funds for the mill for other purposes, and he negotiated for a sum sufficient to take care of these various needs.

Q. What sums of money were due at or to the Peninsula Bank prior to November 23, 1909, and how were they evidenced? A. It was a little over \$10,000, \$2,500 of which was endorsed by Mr. L. F. Barnes, \$1,500 of which was endorsed by Mr. E. W. Warburton, \$780 of which was endorsed by Bozarth Bros., \$1,000 endorsed by Mr. H. S. Bird, and some \$4,000 approximately secured by what we term warehouse receipts, for goods stored in the Williamsburg Warehouse company; those goods by mutual agreement being permitted to be taken out from time to time, and replaced by other goods of like value.

Q. The two notes to which you have referred as having been endorsed by Messrs. Barnes and Warburton respectively, were made while those gentlemen were connected with the knitting mill, were they not? A. They were. One minute—the (65) original indebtedness was. The notes had been renewed or extended from time to time.

Q. Neither of those gentlemen were interested in the mill in Nov., 1909, were they? A. They were not.

Q. And as I understand, by reason of the Messrs. Warburton and Barnes disposing of their interest in the mill, it became necessary to change the form of security. Is that correct? A. Yes. Mr. Barnes refused to continue his endorsements under former conditions.

Q. What precaution, if any, did the bank take in making the loan of \$12,000 secured by deed of trust of November 23, 1909? A. Their first precaution was, as they desired to be perfectly secured in the debt if they made the loan, and having agreed if practicable to make it, to have it secured by the real

estate. They first had the title thoroughly examined, it being agreed that if the title were found clear and good, with the exception of a deed of trust to the Virginia Trust Company, the bank would make the loan. Upon first examination, it was found there were certain liens of record and unreleased against certain machinery. The matter was taken up and called to Mr. Bird's attention. He stated that the amounts had been paid, but the bank declined to make the loan until all liens, except that of the Virginia Trust Co., were released, and an abstract was finally submitted showing a clear title, except for the lien of the trust company.

Q. Can you identify the copies of abstracts of title today filed, marked Exhibits H. S. B. "A" and H. S. B. "B," as being true copies of the abstracts to which you have referred? A. No, I could not. I can simply state that the abstract was presented, and shows clear title, except as above stated.

(66) Q. Who made the abstract to which you refer? A. Henley & Henley, of Williamsburg.

Q. At the time this loan was made, Mr. Phillips, had you any knowledge, actual or otherwise, of the claim now asserted by Holt & Company? A. I had not.

Q. Was not a committee appointed by the directors of Peninsula Bank to look into the advisability of making the loan of \$12,000, and if so, who constituted the committee? A. There was a committee, which consisted, I think, of the president, cashier, and Mr. Henley as attorney for the bank. I am not positive as to the personnel, but I think that is correct.

Q. Were you present when the report of that committee was finally made to the Board? A. I was.

Q. Do you recall whether or not Mr. Bird was present? A. I cannot say whether he was present when this first report was made. On some occasions when the matter was before us, he was present, but in the consideration of this matter, always asked to be excused from voting or representing any interest other than that of the mill.

Q. Do you not recall that when the vote was finally taken on the question of making the loan, that Mr. Bird asked to be excused from voting? A. He did.

Q. It has been shown here that you were one of the directors of the Williamsburg Knitting Mill Company from 1907 to 1909, inclusive. When did you first know that you were a director of this company? A. September 25, 1909.

(67) Q. What was the occasion of your finding out that you were director? A. Mr. Bird came over to the bank with the minute book upon which my signature appears, with his minutes written up, and stated that Mr. Barnes had resigned, that he was left alone in the directory, and it was necessary to

select some one to fill the vacancy, and then informed me that I had for some years,—he didn't say just how long,—been a director in the company, and asked me to serve in that meeting, electing president and secretary, etc., I think, of the company. I was very greatly surprised, which surprise I expressed, and stated that I was very sorry that such had been the case, for the reason that I had once been connected with the company, and had myself surrendered all stock to the new organization, and used my influence to get others to do the same, and that by having carried me in his directory, it might cause others to think that I still had some interest in the mill. I resigned immediately after serving in that meeting, which he said was all right, as he needed me no further, having elected some one to fill the vacancies, and said my resignation would be accepted.

Q. Did you have any stock in the company from 1907 to 1909? A. Not a dollar.

Q. Did you attend any meeting of the Board of Directors other than the one to which you have just referred? A. I did not.

Q. Did you know anything about the management of the affairs during that period. A. Nothing whatever, other than that which I learned as their banker.

CROSS EXAMINATION.

By R. T. ARMISTEAD:

(68) Q. You have just inspected the record of the directors' meeting of the 25th of September, 1909, which minutes you signed. That record shows the election of J. J. Hennessy, does it not, as secretary? A. It does.

Q. Do you recall when Mr. Seymour, whom he succeeded, died? A. I think he died in the July previous.

Q. I see in that book no note of your resignation. How did you resign? A. In fact, I never qualified. I acted upon the spur of the moment in his emergency, not thinking even of qualifying, and at the same time, said to Mr. Bird, as I stated before, that I regretted my connection in that way very much, and then and there tendered my resignation, which he said would be immediately accepted, as he then had other parties to fill the vacancy.

Q. Mr. Phillips, at the date of that meeting, was or not the negotiation that was consummated by the deed of November 23, 1909, then pending? A. I haven't the slightest idea, sir, except from what I have heard here to-day.

Q. Refreshing your memory by the events recorded in this meeting, can you say about when these negotiations for

this \$12,000 loan was commenced? A. I have no idea other than Mr. Bird's statements which I heard to-day. Had I been called upon without outside information, I should probably not come within six months of the period.

Q. The negotiation, when consummated, would require the (69) signature of a secretary to affix the seal of the knitting mill company to the deed, would it not? A. I presume so.

Q. It was necessary that there should be a secretary of the knitting mill company to consummate the negotiation that was pending for the loan of the \$12,000, was it not? A. It seemed so, in the light of recent events.

RE-DIRECT EXAMINATION.

By N. L. HENLEY:

Q. Do you know, and can you say that the application for the loan of \$12,000 was before the Board of Directors prior to September 25, 1909. A. I am quite sure it was not. I don't think so.

Q. You don't mean to say that you voted to elect a secretary that the deed of trust might be signed.

R. T. ARMISTEAD: I object to the question as suggestive and leading.

A. No, I should not have recalled that Mr. Hennessy was elected at that time, without having refreshed my mind from the record just recently, but was only impressed with the fact that that meeting had to do with Mr. Barnes' resignation and the election of his successor.

Q. It appears from the minutes of the Board of Directors of the Williamsburg Knitting Mill Company, page 89, that a directors' meeting was held on November 10, 1909, at which time a resolution was offered and carried, authorizing and empowering the officers to execute a deed of trust, the consent of the stockholders having already been obtained for that purpose, to secure the payment of a sum not to exceed \$12,000 in the aggregate. Were you present at that time, or did you take any part in it? A. I was not and I did not.

(70) Q. Did you at any time have any connection whatever with the affairs of the Williamsburg Knitting Mill Company?

R. T. ARMISTEAD: I object to that question as contradicting the record.

A. I did not.

RE-CROSS EXAMINATION.

By R. T. ARMISTEAD:

Q. I observe that at the same meeting of the directors, 25th September, 1909, that Mr. Bird was elected president in place of Mr. Barnes, resigned, and that that was at the same meeting that J. J. Hennessy was elected secretary. That is correct, is it not? A. It appears so in the record.

H. N. PHILLIPS.

ROBERT L. SPENCER, being sworn and examined, testified as follows:

By N. L. HENLEY:

Q. What official position, if any, did you occupy with the Peninsula Bank November 23, 1909? A. I was president of the Board of Directors.

Q. How long have you held that position? A. I succeeded Mr. Harrell at his death. I think about five or six years ago, and I am still president.

Q. Were you or not also a member of the committee appointed by the Board of Directors to look into advisability of making the loan to the Williamsburg Knitting Mill Company of \$12,000, in November, 1909?

R. T. ARMISTEAD: Question is objected to on the ground that there should be a record of that.

A. I was.

Q. What precaution did the committee take with reference to that loan? A. We had several interviews with Mr. Bird. We examined the records, and found nothing against the mill at that time, and we reported to the Board of Directors, and they made the loan.

Q. Did you or not also cause the title to the property to be examined by counsel? A. Yes, sir.

Q. At that time, Mr. Spencer, did you have any knowledge, actual or otherwise, of any claim of George H. Holt & Company?

R. T. ARMISTEAD: Question is objected to as calling for a question of law.

A. None in the world, sir, to my knowledge.

Q. When did you first know or hear that there was such a claim being asserted? A. After the mill had gone into bankruptcy. I heard that the liabilities were excessive, or overmuch, and I think I saw a list of the liabilities somewhere, and this debt was included.

Q. Did any member of the Board of Directors of the Peninsula Bank, so far as you know, have any knowledge or notice of the claim of Holt & Company, other than Mr. Bird? A. Not that I know of. I never heard it mentioned at that time, or until after the mill went into bankruptcy.

Q. Were you present when the report of the committee with reference to that loan was made? A. I was.

Q. Do you or not recall that Mr. Bird asked to be excused from voting on that question? A. I do, sir.

R. T. Armistead, counsel for George H. Holt & Co., here calls for the record of the Board of Directors of the Peninsula Bank, which record was produced and was read, dated November 19, 1909, which shows that Mr. Bird was excused from (72) voting. The said record also shows that on October 26, 1909, R. L. Spencer, President, H. N. Phillips, Cashier, and Mr. N. L. Henley, a director, were appointed a committee to examine into the advisability of making a loan to the Williamsburg Knitting Mill of \$12,000, and to report at the next meeting of the Board of Directors.

Q. Would the bank have made this loan if the title had not been clear, except the lien of the Virginia Trust Company? A. I wouldn't of voted for it as director and president, and I don't believe that the Board of Directors would have made the loan.

CROSS EXAMINATION.

By R. T. ARMISTEAD:

Q. Do you know when the negotiation for this loan first commenced, or rather, when Mr. Bird first applied for it? A. It must have been, I think, somewhere in October or last of September,—first of October, 1909. I think our committee reported about the 25th of November, 1909.

Q. And at the pending of this negotiation for this loan, it has been testified here that the bank was carrying several notes, in all amounting to something like \$10,000. Was it not to secure that \$10,000 that this negotiation was made? A. The knitting mill owed the company something at that time,—I don't know the exact amount, but it was made secure by loans that we had against the mill.

Q. Pending conversations in regard to the knitting mill's negotiation for the money that was due by that company, was not the installation of a fire insurance apparatus mentioned? A. Not to my knowledge, Mr. Armistead. I heard Mr. Bird say on one occasion that he was putting in some machinery, but I don't know what it was,—some apparatus that he said would save \$1,200 a year on his insurance.

RE-DIRECT EXAMINATION.

By N. L. HENLEY:

(73) Q. Mr. Spencer, it appears from the minutes of the records of the Peninsula Bank that the committee which you have referred to held their meeting on October 26, 1909. Do you not recall that that was the first time the application had been before the Board? A. My opinion is that the committee was appointed at that time.

Q. The next meeting of the Board was on November 19th, as shown by the record. A. The records are right. I stand by them. I don't remember dates.

Q. Then the loan was being considered from October 26th to November 19th? A. Yes, sir.

By R. E. HENLEY:

Q. Is it or not a fact that a part of the indebtedness of the mill which was taken up by the deed of trust, was prior to the time of the execution of the deed of trust secured in some manner by warehouse receipts, for goods in the Williamsburg Warehouse Company, and that these goods were released by the execution of the deed of trust? A. That is right.

By N. L. HENLEY:

Q. It is also true, is it not, that a part of the notes taken up at that time had been endorsed by Mr. Warburton and Mr. L. F. Barnes. A. I think so.

Q. Then the \$12,000 loan, as I understand, was to take up the then indebtedness held by the bank, and additional funds (74) that the mill might need, all of which prior indebtedness was secured in some manner? A. Yes.

RE-CROSS EXAMINATION.

By R. T. ARMISTEAD:

Q. Was or not that extra amount covered with two notes, each for \$1,000, one due January, 1910, and the other due

February, 1910, mentioned in the deed? A. I think so. I think that we laid particular stress upon the fact that we would simply loan him \$12,000, but that the mill should pay back \$1,000 in January and I think \$1,000 again in February.

Q. And those notes were paid when they matured? A. Yes.

RE-DIRECT EXAMINATION.

By N. L. HENLEY:

Q. There was no special ear mark on the \$2,000? It was simply understood that \$2,000 should be paid in January and February, and \$10,000 in six months? A. Yes.

And further this deponent saith not.

RO. L. SPENCER.

ROBERT E. HENLEY, being first duly sworn, and examined, testified as follows:

By N. L. HENLEY:

Q. What was your occupation in the fall of 1909? A. Lawyer; member of the firm of Henley & Henley.

Q. Were you called upon by Mr. Bird, and did you examine the title to the property of the Williamsburg Knitting (75) Mill situate in Williamsburg, Virginia? A. I did.

Q. When did you make the examination? A. I made the first examination, as will appear by copy of the abstract already filed, marked H. S. B. Exhibit "A," October 18, 1909, and the second abstract October 27, 1909, as will appear by abstract filed marked H. S. B. Exhibit "B."

Q. What liens, if any, were found against the property? A. Upon the first examination, I found that there were three liens: in favor of the Rodney Hunt Machinery Company for \$250, The Virginia Trust Company to secure certain bond issue, for \$18,000, and the Tompkins Bros. \$2,010. Upon the examination made Oct. 27, 1909, I found that all of the lien indebtedness had been satisfied except the indebtedness secured by deed of trust to Virginia Trust Company, trustee.

Q. Were you or not associate counsel with Norvell L. Henley in the preparation of the deed of trust of November 23, 1909? A. I was.

Q. In that connection, did you or not examine the charter with the various amendments, of the Williamsburg Knitting Mill Company? A. I examined it very fully.

Q. Was there anything in the records of the clerk's office, or any records of the company that you saw, to indicate any claim in favor of George H. Holt & Company?

R. T. ARMISTEAD: The contract with George H. Holt & Company shows on its face that nothing was due them until the completion of the work by the installation of the sprinkler. The evidence here shows that that work was not completed until March, 1910, and consequently there could not be any lien on the records up to that time.

A. There was none, and in this connection I will state that I examined the personal property books, wherein liens on (76) personal property are recorded, as well as the current deed books.

And further this deponent saith not.

ROBERT E. HENLEY.

It is here admitted by all parties that there is no record either of the stockholders or directors of the Williamsburg Knitting Mill Company, authorizing the making of a contract between said company and George H. Holt & Company.

And now, at 4:45 P. M., the further taking of these depositions is adjourned until Wednesday, November 23, 1910, at eleven o'clock, A. M., at the law office of O. D. Batchelor, attorney at law, Newport News, Virginia.

JNO. B. LOCKE,

Special Master and Referee in Bankruptcy.

I hereby certify that pursuant to adjournment noted above, I sat at the time and place above-mentioned for the purpose of taking depositions and none being offered by any person in interest no further adjournment is ordered for the further taking of testimony.

JNO. B. LOCKE,

Special Master and Referee in Bankruptcy.

Nov. 23, 1910.

DEPOSITION OF E. W. WARBURTON TAKEN NOVEMBER 2, 1910.

Filed January 11th, 1911.

E. W. WARBURTON, being duly sworn and examined with reference to the liens created by the deed of trust respectively, at the time and place above mentioned herein, upon his oath, says:

By N. L. HENLEY:

(77) Q. Were you familiar with the affairs of the Wmsburg Knitting Mill Company prior to February 23, 1906? A. From the reorganization up to the time I left the mill, I was reasonably familiar with it.

Q. You subscribed to a part of the preferred stock, did you not? A. Yes, sir.

Q. Was or not the preferred stock fully paid for? A. Yes, sir.

Q. How many bonds, secured under the mortgage to the Virginia Trust Company, are outstanding? A. When I was president of the mill, there was \$17,500 outstanding. They were authorized to issue \$18,000, but \$500, one certificate, was never sold, never issued up to that time.

Q. Has it been issued since that time, to your knowledge? A. Not that I know of.

Q. What improvements, if any, have been put on the plant of the Wmsburg Knitting Mill since the 1st day of January, 1901? A. The carding and spinning rooms have been added, and I think a brick building for the garnette picker. It used to be on the second floor, but on account of so many, frequent fires, it was put in a separate building built for that purpose. The same machinery was used, as near as I can remember.

Q. Then I understand from your answer that there was more machinery and more buildings in connection with this plant in November, 1909, than there were in January, 1901. Is that correct? A. The equipments of those two rooms were put in. I don't recall just what it cost, but I think that was paid out of the preferred stock issued.

Q. Can you give us some idea of the approximate cost (78) of those improvements? A. I could not, sir.

Q. The building on the west side of the knitting mill proper has been constructed in the past few years, has it not? O. At the west end where the wooden structure was which was used for these purposes.

Q. That was not there in January, 1901? A. No, sir.

Q. Has or not some machinery been supplied, some new and up-to-date machinery, since that time? A. All that machinery was bought since 1901. None of that machinery was there up to 1901. The carding and spinning room was unknown to Williamsburg up to 1901.

Q. A tank and tower and sprinkling apparatus has also been added to the plant in the last year or two, was it not? A. The tank and tower has been added. I don't know about the sprinkling plant. I haven't been in the mill since I sold it—to my knowledge.

Q. Will you now look at the deed of trust filed with the petition of H. N. Phillips and others, trustees in bankruptcy, marked exhibit "B," dated November 23, 1909, and state what articles of machinery mentioned therein are not included in the deed of trust to Virginia Trust Company of January 1, 1901. A. Well, the carding and spinning room could not have been included in the Virginia Trust Company mortgage, because it was put there afterwards, and the tower could not have been included when these bonds were sold, and to my knowledge no bonds have been sold since that annex was put on there and the machinery installed in it.

Q. You are a director of the Peninsula Bank, are you not? A. Yes, sir.

(79) Q. Also vice-president I believe? A. Yes, sir.

Q. When the loan secured by the deed of trust just shown you was made, had you any knowledge, actual or otherwise, of any prior claim to any part of the property conveyed, except the deed of trust to the Virginia Trust Company? A. None whatever. If I had, I should never have taken the deed of trust,—or would have objected to it.

By R. T. ARMISTEAD:

Q. Was or not Mr. Bird one of the directors of the Peninsula Bank? A. Yes, sir.

Q. Was or not Mr. H. N. Phillips, a director, or cashier, in which capacity was he? A. Director and Cashier in the Peninsula Bank.

Q. Have they or not, each of them, occupied that same position ever since the bank was organized? A. Yes, sir.

Q. Do you know when the sprinkler system was put into that Knitting mill? A. I do not.

Q. Do you or not know that it was put in subsequent to the deed of trust about which you have been speaking? A. I do not. We have always had some method of sprinkling there, but whether it has been changed from the old method to the new, I could not tell you. I haven't been through the mill for two years.

Q. Then you have never seen the present sprinkling apparatus. A. I have not.

And further this deponent saith not.

E. W. WARBURTON.

DEPOSITION OF H. S. BIRD TAKEN OCTOBER 18, 1910.

(80) Filed January 3rd, 1911.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

In the Matter of
Williamsburg Knitting Mill Co., Inc., } In Bankruptcy.
Bankrupt. #1060.

At Williamsburg, in said district, on this 18th day of October, A. D., 1910, before John B. Locke, referee in bankruptcy.

Present: HENLEY & HENLEY, counsel for trustees and certain creditors;

WILLIAMS & MULLE, counsel for bankrupt;

FRANK ARMISTEAD, B. D. PEACHY, and R. T. ARMISTEAD, counsel for creditors;

H. N. PHILLIPS, J. B. C. SPENCER, and W. T. COOKE, trustees in bankruptcy.

H. S. BIRD, president and treasurer of the said Williamsburg Knitting Mill Company, bankrupt, being duly sworn and examined at the time and place above mentioned, upon his oath, says:

By Mr. N. L. HENLEY:

Q. You are the president and treasurer of the bankrupt company, are you not? A. I was.

Q. Among the claims that were presented to the referee at the last meeting of creditors, there was one in favor of L. F. Barnes for \$2,150, evidenced by note purporting to be made by the Knitting Mill Company, and endorsed by H. S. Bird

and M. S. Bird. Will you state to the referee the consideration of that note,—what it was given for? A. When the note was written, it was done at the railroad station, when the train (81) was just about coming in. I thought the transaction was my own; all payments made on the original note were by me, by my personal check; the stock was to be my own. However, I had planned, and I thought Mr. Barnes knew it, to have the mill buy from me; at the time I thought the mill was better able to carry it than I was. In other words, to retire this stock at par. But he required at the last moment, after I had written at the bottom of the note "H. S. Bird," that it be a mill obligation, and I had to endorse it, so I wrote in the name of the mill over my own, with the full intention of so writing up the minutes at the next directors' meeting; the directors consisted of myself and my family. As to my putting my signature on the notes, I wanted to have the mill own the stock immediately instead of waiting until it passed through me. I did not feel competent to write these minutes alone; I wanted at least an attorney or expert accountant, or both, to make the transaction legal,—of course it was a close corporation,—myself and my family. And I actually do the writing of the minutes. But when I wrote to Mr. Barnes and asked him for the stock, he said, No, he was going to keep it until the mill finished paying for it. I was then at a loss to know how to make it a mill obligation, when the mill did not actually have the stock. I then asked Mr. Barnes to surrender so much of the stock as would correspond to the actual money he had gotten. This he declined to do. So the matter stood, in form as a mill purchase, though not completed on the directors' minutes, and never has been completed. I regarded it as my personal obligation, to be afterwards taken off my hands by the mill, although if Mr. Barnes had at the times surrendered the stock corresponding to the amount of money paid, it would have (82) passed directly in the hands of the mill. So there was no entry ever made on the book, and when I paid \$350 on account of the note, it was paid by personal check, and I regarded it as my own obligation, although the form of the obligation was the mills, and I wanted to get advice to make it the mill's eventually.

Q. Then as I understand from your answer, the note referred to was given for the purchase of certain stock of the Knitting Mill Co. Is that correct? A. Yes.

Q. Was there any other consideration except the stock? A. None whatsoever.

Q. What time was it that this matter was negotiated with Mr. Barnes? A. November, 1909, I don't know the exact date.

I'd like to state further that the purchase was made because Mr. Barnes, who had been president of the company, was co-endorser on all notes of the company with me, and he had come down to Williamsburg and announced his intention of getting out of the mill altogether,—withdrawing his endorsement from the notes, and if necessary, to wind up the affairs of the company and know what damage was coming to him and quit. I bought this stock, believing firmly in the solvency of the company and its ability to make money, but would not have done so had he not said that he was going to no longer endorse notes. Further than that, he had, on every successive maturity of a note, required that I curtail it by amounts larger than I thought the mill could spare for the purpose.

Q. You did not include the obligation which has been referred to, in favor of Mr. L. F. Barnes, in the schedule of the indebtedness? A. The schedule was made up by Major Evans, expert accountant, and there was no notation of the transaction (83) on the books, and so he had no data to go by.

Q. Do I understand you to say that this obligation, in point of fact, has always been your personal obligation, and not that of the mill? A. Yes.

Q. Mr. Bird, in reference to the claim of George W. Kavanaugh, 117 South Second street, Philadelphia, I observe from the schedule of the unsecured debts filed with the petition in this matter, that it is put down at \$3,635.11, whereas it appears from the claim as filed with the referee that it amounts to \$4,588.84. State if you know wherein the discrepancy occurs between the two amounts. A. It would be absolutely impossible for me to tell. I do know that Kavanaugh's bookkeeper is extremely inaccurate on all points.

Q. Where did you get the information from? A. I didn't get it; the expert accountant got it.

Q. Where did you get the information from in putting down the debt as \$3,635.11? A. The expert accountant made out the schedule and not myself.

Q. Made it from the books of the company I presume? A. Made it from the books of the company.

Q. Was there anything purchased from Kavanaugh after the expert accountant made up this statement? A. Not that I know of. I wasn't here.

Q. What was the custom between the mill and Kavanaugh with reference to any allowance on his accounts during the conduct of the business. A. All bills rendered for threads wound on cones were subject to a discount for tare of one per cent. Kavanaugh made this allowance on his bills, as all other (84) merchants do it, but always accepted this deduction from the account when payment was made, because he knew and I knew it was the custom.

By Mr. R. T. ARMISTEAD:

Q. At the time of this transaction that you have fixed as of Nov., 1909, with Mr. Barnes, who was the directors of the Williamsburg Knitting Mill Co., Inc.?

Henley & Henley, counsel for trustees, except to the question, upon the ground that it is immaterial; and any answer made thereto.

Mr. WILLIAMS: Counsel for bankrupt also excepts to the question of Mr. Armistead, on the ground that it is irrelevant and immaterial, because it has already been testified by the witness that the Board of Directors did not pass on this contract with Mr. Barnes, and that it was never made a matter of record by the mill; and any answer made thereto.

A. At the time of the reorganization in 1904, the directory was reduced from a large number to three, and the three elected were Barnes, Warburton and Bird. At a later date Warburton's stock was purchased by me, and he resigned as director. At the first meeting thereafter, Mr. Barnes insisted that there should be a director elected to succeed Mr. Warburton, because in the case of the death or disability of either of us, the organization would be lost. So Mr. H. N. Phillips was elected in place of Mr. Warburton. He was never notified of his election, nor did he ever serve or take any part whatever in the affairs of the company, until the peremptory resignation of Mr. Barnes, which was antecedent to the sale of stock, and contemporaneous with the death of the secretary of the company. Then I asked Mr. Phillips to serve as a director, so that I might elect a successor to succeed the deceased secretary, and to elect a director to succeed Mr. Barnes. Mr. Barnes wouldn't even come to the meeting. There were matters at hand which required the signature of a secretary etc. Mr. Phillips vigorously protested until I put it on personal grounds. Then we (85) met, he and I,—This was about 1909,—in the bank of the Peninsula Bank, elected a secretary to succeed Mr. Seymour, deceased, elected my wife a director to succeed Mr. Barnes resigned; then Mr. Phillips resigned as director, and the organization stood with two directors, my wife and myself. His (Mr. Phillips') participation in the affairs of the company was absolutely limited to the elections named, and no discussion of any business affairs was had.

Q. Is there a record kept of the meeting of the directory?

A. Yes.

HENLEY & HENLEY: Same objection to all of these questions.

Mr. WILLIAMS: Same objection.

Mr. R. T. Armistead now says that he is now associated with Mr. Frank Armistead as counsel for certain general creditors, and proceeds to examine the witness.

Q. Do you know where that record is? A. I left it in the safe at the mill.

Q. Did you or not, as required by law, make reports to the State Corporation Commission as to the officers and directors of this Knitting Mill Company? A. I did.

Q. On those reports for the year 1909, beginning with January 28th, is or not the Board of Directors reported as L. F. Barnes, H. N. Phillips, and Hugh S. Bird?

No answer made.

Frank Armistead, counsel for creditors, now calls for the minutes.

Adjourned at 1:30 until 2:15 P. M.

Examination resumed at 2:30.

Same parties present.

(86)

By Mr. R. T. ARMISTEAD:

Q. Was or not a record kept of the meetings and actions of the stockholders of this company? A. Yes.

Q. Where is that record? A. I left it in the mill safe.

Q. Do you know where it is now? A. Haven't seen it for a good many months.

Mr. ARMISTEAD: I want that produced, Mr. Referee.

The trustees state that they have this book in their possession, and it can be seen at any time by Mr. Armistead or any other interested party who wishes to examine it.

By Mr. FRANK ARMISTEAD:

Q. In reference to the claim of A. I. Croll, I notice that you give in the liabilities of the concern their claim as \$4,134.22. Do you know whether that is the correct amount of their claim or not. A. I did not make up the schedule; the expert accountant did it.

Q. I have a bill of lading signed by M. T. Shipman, and by the Knitting Mill per you as shipper, for eight cases of

goods, which appears to have been shipped to Croll. Do you know anything about these cases of goods? A. Eight cases were shipped to Croll; the actual numbers on the cases I do not know, as they were furnished me by some clerk.

Q. I have been informed by the receivers that the eight cases of goods numbered in that bill of lading were in the mill or warehouse at the time they took charge of the bankrupt estate. A. Then there were eight other cases that actually were sent; the clerk gave me the memorandum of the numbers.

(87) Q. You don't know whether they are the correct numbers or not? A. Eight cases did go back, because I marked them myself with my own hands. As to the numbers, they were furnished me by the bookkeeper, and if those identical eight cases didn't go to Croll, there were eight other cases that did go.

Q. According to the account that has been filed with the referee, unless you had shipped to Mr. Croll 20 cases of goods, this amount would not be correct. Do you remember how many cases of goods you shipped? A. No.

Q. Then I understand that it may be a mistake as to the numbers? A. Yes, but they were in the car, and they were not so piled that I could read the numbers, so I marked the cases myself, and went to the bookkeeper and asked for the invoice corresponding, as he always shipped eight cases, and the bookkeeper gave me the numbers. I know eight cases went, but there may be eight other cases in the warehouse; the contract was for eight cases weekly, and it had been going on for a year.

Q. Mr. Bird, at the time that the deed of trust was executed to secure a loan to The Peninsula Bank, was that money borrowed at the time from the bank, or was it to secure money that was already owing to the bank, and represented unsecured notes?

Mr. HENLEY: Counsel for Peninsula Bank objects to the question, because it is thoroughly immaterial, there being nothing in this record to suggest that any attack whatever has been made upon the lien purporting to secure the Peninsula Bank as to the petition of Holt & Co., which petition is not yet in issue.

A. It was for money borrowed at the time.

By Mr. N. L. HENLEY:

(88) Q. Mr. Bird, it appears from the bill of lading exhibited by Mr. Armistead that on August 25, 1910, the Wmsburg. Knitting Mill Co. delivered to the transportation Co., the C. & O. Railway Co., eight cases of cotton yarn, consigned to Albert I. Croll. Was that much goods delivered to the railroad company on that day? A. It was.

Q. Then they were not in the warehouse after that time?
A. Never taken out of the car.

By Mr. PEACHY:

Q. Mr. Bird, when did you first become aware of the fact that this Knitting Mill was insolvent? A. Very strong reason to suspect it on the 2nd of August, 1910.

Q. Were you or not acquainted with the accounts of this mill, as being the general manager? A. I tried to be, but I had no bookkeeper for nearly a year. The people who had been occupying the place had not been performing their duties.

Q. Was it not your business to see that they did perform their duties? A. It was.

Q. Didn't you keep in touch, Mr. Bird, with the liabilities and assets of that business? A. I did.

Q. Mr. Bird, when did Mr. Phillips resigned as director of that knitting mill? A. Within a few seconds after he participated in the election of a successor.

Q. Do your minutes show that? A. You hold the minutes.

(89) Mr. HENLEY: Question objected to, the record being the best evidence.

Q. When was the last report you made to the State Corporation Commission? A. The record will show.

Q. Do these records show when Mr. Phillips resigned?
A. You have them.

Q. I fail to find them. I see from the meeting of the stockholders as recorded in the minutes that H. N. Phillips acted as Acting secretary on September 25, 1909. Where was Mr. Phillip's resignation recorded? A. It should be in that meeting, the only meeting he attended.

Q. Where were these minutes written? A. I don't remember where.

Q. I wish you would look at this minute book, and show me where Mr. Phillips' resignation is written, when Mr. Phillips resigned as director of that company? A. It was evidently omitted, Mr. Peachy.

Q. Then he omitted to send in his resignation, did he not?
A. He resigned verbally.

Q. Is that the way you did business at your knitting mill?
A. Frequently.

Mr. HENLEY: May we ask that the gentleman state the object of this inquiry?

Mr. PEACHY: I just wish to see whether they had a quorum there at any time, to transact business at any time.

Q. Mr. Bird, when was the debt contracted with Bozarth Brothers? A. The records will show.

Mr. WILLIAMS: The question is immaterial; the account is not disputed.

(90) REFEREE: Your claim has been allowed, Mr. Peachy, and no objection made to it.

By Mr. FRANK ARMISTEAD:

Q. In answer to my question previously propounded, you stated that the deed of trust to secure the Peninsula Bank was for money that was borrowed on that date. Was or not also included in that loan money that the Knitting Mill owed the Bank previous to that time? A. No.

Q. I notice from the minutes of the meeting of the directors, that there is authority given the officers of the mill company to execute notes etc. to take up certain indebtedness and to borrow other moneys. Who held the indebtedness spoken of in those minutes? A. I don't understand your question.

Mr. PEACHY:

Q. Mr. Bird, where is your charter? A. I left it in the mill safe. There are several amendments to the charter.

Mr. FRANK ARMISTEAD:

Q. (Last question of Mr. Armistead, beginning "I notice" etc. repeated.) I refer to the minutes of the meeting of November, 1909, recorded on page 89 of the Directors Minutes of the Wmsburg Knitting Mill Co. A. The records of the mill company, especially the check stubs in and about that date, will tell exactly what indebtednesses were paid in and about that time.

Q. Did or not the Peninsula Bank at that time hold certain notes of the Knitting Mill Company that were not secured and paid out of this fund that was borrowed?

Mr. HENLEY: Counsel for Peninsula Bank excepts to this question and to this line of examination, upon the ground that there is no priority whatever between the interest represented by the gentleman propounding the question and the deed of trust given to the Peninsula Bank; there is no allegation of any fraud or wrong doing, and that the deed of trust

to the Peninsula Bank, for the purpose of this record appears to be absolutely clear and unquestioned; that same was executed, delivered and recorded more than four months prior to the filing of the petition herein, and that until the same is attacked, it is a valid and proper lien; and upon the further ground that the gentleman has not stated or intimated the purpose of this line of examination, except the insinuation which goes with the question, that would by implication attack the said deed of trust.

A. No.

By Mr. PEACHY:

Q. When did your secretary cease to keep your books at the knitting mill? A. It turned out he never really had begun.

Q. That is not an answer to my question. A. Well, I don't know then.

Q. Up to what date were your accounts kept at that Knitting Mill under your supervision? A. Up to the date of the bankruptcy.

Q. I understand that you stated in a previous question that you had no one who was capable of attending to your accounts. Is that a fact or not? A. It is, up to May 20, 1910. From the death of Mr. Seymour, or rather his illness about the 21st of June, 1909, until the 20th of May, 1910, the parties occupying that position made trials at it, and were discharged and replaced, and finally there was nothing satisfactory gotten until the 20th of May, 1910.

Q. Having a competent bookkeeper, would you or not know the condition of that corporation at all times and on all (92) occasions with the exception of the time of incompetency which you above mention?

Mr. WILLIAMS: Object to to the question as irrelevant and immaterial, and calling for opinion, not asking for a fact. Witness is not called upon to give opinions and there is no allegation of any wrong doing.

A. Yes.

Q. Would you or not have known then if that mill were insolvent if you contracted debts at that time?

Mr. WILLIAMS: I object to the question as irrelevant and immaterial, and that there is no allegation of fraud or wrong doing, and that therefore the question is improper.

A. I presume so.

Mr. N. L. HENLEY:

Q. I notice among the liabilities of the company, under the head of "Notes Outstanding," filed with the petition in bankruptcy, that there is a note in favor of H. S. Bird, Williamsburg, Virginia, entitled "Call Loan" for \$2,000. Will you explain the consideration of this note,—when it was made and for what purpose? A. Cash loaned the mill. The books of the corporation have an elaborate notation made by the expert accountant, reciting the history of the transaction. I cannot tell it from memory.

Q. What is the date of the note, if you remember? A. I don't remember. No note was ever given.

Q. What did the \$2,000 consist of? A. Cash advanced.

Q. When? A. Per date on the books.

Q. Between what periods approximately were they advanced? A. It was in February, 1905, if I remember right.

(93) Q. Was the entire amount advanced at once, or was it at different intervals? A. \$6,000 advanced at once, and \$4,000 had been paid off within a very short time, leaving the \$2,000.

Q. What evidence of debt have you other than the book that you have referred to? A. The evidence consists of two checks drawn,—Mr. Warburton was present at the time,—payable to my order. I was to use them to pay off the debt whenever I chose to deposit them in bank. The concern never had the cash to spare, and the checks are in my possession now. Before they got out of date, the expert accountant made the notation on the books referred to.

Q. Then your contention is that the \$2,000 is still due you personally? A. Yes.

Mr. WILLIAMS:

Q. I would like to ask whether or not he endeavored to secure other bookkeepers after the illness and death of the former bookkeeper, and whether he finally succeeded or not, and how he tried to get a good bookkeeper. A. Immediately upon the death of the former bookkeeper, I secured one named Hennessy, but while not experienced, I was lead to believe could be made into an extra good man. He kept the books for six months, some of them written up to date, but the main ledger not written up. Thinking this was due to his lack of experience, I did not urge him to complete this part of the record until the semi-annual visit of the expert accountant was due in January, 1910. When the expert accountant came, he gave me an opinion verbally and in writing, that said Hennessy was

not only incompetent, but was too obstinate ever to learn anything. I immediately transferred Mr. Hennessy from the (94) office to another department of the mill, and began negotiations looking to the employment of an extra good bookkeeper, for whom I was willing to pay a much more liberal salary than I had before. Such a bookkeeper was engaged, and promised to come February 1, 1910. At about that date, he gave good excuses for not coming and re-engaged himself to come March 1st; the same as to April 1st. I then saw him, and required of him that he come then or stop fooling with me. He then declined to come. I immediately began a new set of negotiations, which finally resulted in the employment of Mr. Ferebee, the incumbent at the time of the bankruptcy, who took charge on or about May 20, 1910. I immediately then discharged from my employ the ex-bookkeeper, who had been continuing a sort of overlooking of the books during the previous months.

Q. You have spoken of an expert accountant. Did you have your books audited regularly? A. Twice a year.

MR. FRANK ARMISTEAD:

Q. I notice you have here on the liabilities, H. S. Bird, Williamsburg, Virginia, call loan \$2,000. I understood you to say that you had that loan several years. Have you ever given that in for taxation of property as to any evidence of debt that you had? A. No, the mill never paid me any interest on it.

MR. LOCKE, Referee:

Q. So far as you know, has this bankrupt corporation surrendered all of its assets? A. It has.

H. S. BIRD.

The meeting of creditors and further taking of depositions is adjourned until November 2, 1910, at 11 A. M., at the same place.

JNO. B. LOCKE,
Referee in Bankruptcy.

**EXHIBIT H. S. B. EXHIBIT "A" WITH DEPOSITION OF
H. S. BIRD.**

(95)

Filed January 3rd, 1911.

Abstract of Title.

to all that certain property lying south of the Chesapeake & Ohio Railroad, in the City of Williamsburg, Virginia, known as the property of the Williamsburg Knitting Mill Company, bounded as follows: on the North by the C. & O. Railroad; East by Grigsby street; south by the property of the College of William and Mary; and West by a stream dividing said land from the land of the Williamsburg Female Institute, made by Henley & Henley, attorneys at law, October 18, 1909.

The records of James City County show no title to this land further back than 1899, when this land, which was formerly a part of York County, was made a part of James City County by an extension of the corporate limits of the City of Williamsburg.

(1) On August 1, 1900, the Chesapeake & Ohio Railway Company conveyed, by deed of bargain and sale, to the Williamsburg Knitting Mill Company, the above described real estate.

See Deed Book #3, page 478-483.

(2) On September 17, 1900, Rodney Hurt Machine Company sold to the Williamsburg Knitting Mill Company one six string washer, type C. T. & L. pulleys, of the value of \$250, reserving title to the said machinery.

See Contracts for Personal Property book, page 68.

This lien has never been marked satisfied, though the debt is out of date.

(3) On January 1, 1901, the Williamsburg Knitting Mill Company conveyed this land, together with all the improvements thereon, to the Virginia Trust Company, trustee, to secure to the holders thereof the payment of thirty-six coupon (96) bonds, payable ten years after date at The Peninsula Bank of Williamsburg, Virginia, each of the denomination of \$500, interest payable annually at the rate of six per cent.

See Deed Book #3, pages 500-507.

(4) On May 29, 1903, Tompkins Brothers sold to the Williamsburg Knitting Mill Company three double lush Tompkins knitting machines, of the value of \$2,010, reserving title to same. Three notes for six, twelve, and sixteen months were given for the same, each note of the value of \$670.

See Contracts for Personal Property book, page 80. This lien has never been marked satisfied.

There are no judgment liens against this property, no delinquent taxes, and no liens of record of any other kind whatsoever, except those expressly mentioned in this abstract, to-wit: to the Virginia Trust Company, trustee, to secure \$18,000, to the Tompkins Brothers, reservation of title, \$2,0110, and to Rodney Hunt Machine Company, reservation of title, \$250. We certify that the above abstract is correctly taken from the records of the clerk's office of the City of Williamsburg and County of James City.

Respectfully submitted,

Attorneys.

**EXHIBIT H. S. B. EXHIBIT "B" WITH DEPOSITION OF
H. S. BIRD.**

Filed January 3rd, 1910.

Abstract of Title.

to all that certain property lying south of the Chesapeake & Ohio Railroad, in the City of Williamsburg, Virginia, known (97) as the property of the Williamsburg Knitting Mill Company, bounded as follows: on the North by the C. & O. Railroad; East by Grigsby street; South by the property of the College of William and Mary; and West by a stream dividing said land from the land of the Williamsburg Female Institute, made by Henley & Henley, attorneys at law, October 27, 1909.

The records of James City County show no title to this land further back than 1899, when this land, which was formerly a part of York County, was made a part of James City County by an extension of the corporate limits of the city of Williamsburg.

(1) On August 1, 1900, the Chesapeake & Ohio Railway Company conveyed, by deed of bargain and sale, to the Wil-

liamsburg Knitting Mill Company, the above described real estate.

See Deed Book #3, pages 478-483.

(2) On January 1, 1901, the Williamsburg Knitting Mill Company conveyed this land, together with all the improvements thereon, to the Virginia Trust Company, trustee, to secure to the holders thereof the payment of thirty-six coupon bonds, payable ten years after date at The Peninsula Bank of Williamsburg, Virginia, each of the denomination of \$500.00, interest payable annually at the rate of six per cent.

(See Deed Book #3, pages 500-507.

There are no judgment liens against this property, no delinquent taxes, and no liens of record of any other kind whatsoever, except the one expressly mentioned in this abstract, to-wit: to the Virginia Trust Company, trustee, to secure \$18,000.00.

We certify that the above abstract is correctly taken from the records of the clerk's office of the city of Williamsburg and County of James City, in the State of Virginia.

Attorneys.

CERTIFICATE OF REFEREE LOCKE WITH CERTAIN EXHIBITS.

(Copy of Minutes.)

(98) Filed February 14th, 1911.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

In the Matter of	}	In Bankruptcy. No. 1060.
Williamsburg Knitting Mill Company,		
Bankrupt.		

I, Jno. B. Locke, referee in bankruptcy, and special master under an order of the above-named court entered on the 28th day of September, 1910, pursuant to an agreement made between counsel for George H. Holt & Company, counsel for the trustees in bankruptcy of the above-named bankrupt, and counsel for the Peninsula Bank of Williamsburg, Virginia, and Norvelle L. Henley, trustee, at the time of the taking of the introduction of the testimony in the matter of the petition of

George H. Holt & Company filed in the above cause, do hereby certify that the attached papers marked, respectively, Exhibits Nos. 1, 2, 3 and 4, are true and accurate copies of the minutes of the stockholders' meetings of the Williamsburg Knitting Mill Company as the same appear for the respective dates named on said copies and as the same appear on the pages of the said Minute Book of said company as given on said copies.

And, pursuant to the same agreement, I do further certify that the attached paper marked "Exhibit No. 5" is a true and accurate copy of the minutes of the Directors' meeting of the said company as the same appear for the date named on said copy and as the same appear on the page of the Minute Book of the said company as given on the said copy.

Pursuant to the agreement aforesaid, I certify the said copies as a part of the evidence with my report filed in this (99) cause on the 3rd day of January, 1911.

JNO. B. LOCKE,

Referee in Bankruptcy and Special Master.

Dated Newport News, Va., February 13, 1911.

Exhibit No. 1.

Minutes of the stockholders' meeting held Jan. 25th, 1906, the same being the regular annual meeting of this Co.

Dr. Chas. Edw. Bishop was elected chairman and H. N. Phillips, secretary.

The secretary reported the following shares represented at the meeting:

16 shares in person,

1,172 shares by proxy.

On account of the absence of several prominent stockholders it was deemed best to adjourn the meeting until Thursday, Feb. 1, 1906, at noon, and on motion duly considered the meeting was adjourned to that date and hour.

Chairman.

Sec'y.

"Stockholders' Minutes, pages 65-66."

NOTE: Minutes not signed.

Exhibit No. 2.

The regular annual meeting of the stockholders of this Co. held at their office at noon Jan. 31st, 1907. L. F. Barnes was elected chairman and J. H. Seymour, secretary.

The secretary reported the following shares represented in the meeting:

- (100) In person 859 shares of common stock;
 42 shares of preferred stock;
 By proxy 244 shares of common stock;
 5 shares of preferred stock.

The same representing 2,043 votes of a total of 2,578 entitled votes.

The chairman declared a quorum present and the meeting ready for business.

The treasr. read his annual report which was ordered filed, the financial report to be incorporated in the minutes as follows:

The election of officers and directors for the ensuing year was then gone into with the following result, all shares present being voted for the persons named:

L. F. Barnes, President;
 H. S. Bird, Vice-President;
 J. H. Seymour, Secretary;
 H. S. Bird, Treasurer.
 L. F. Barnes, }
 H. S. Bird, } Directors.
 H. N. Phillips, }

The meeting then adjourned.

(S) L. F. BARNES, Chairman.

(S) J. H. SEYMOUR, Secretary.

"Stockholders' Minutes, pages 70-71."

Exhibit No. 3.

Minutes of stockholders' meeting held Jan. 30, 1908, the (101) same being regular annual meeting of this company.

H. S. Bird was elected chairman and J. H. Seymour secretary.

The secretary reported the following shares represented in the meeting:

In person 500 shares of common stock,
 28 " " preferred stock,
 By proxy 244 shares of common stock,
 5 " " preferred stock.

The same representing 1,404 votes out of a total of 2,578 entitled votes.

The chairman declared a quorum present and the meeting ready for business.

The treasurer read his annual report which was ordered incorporated in the minutes of this meeting. It was:

The election of officers and directors for the ensuing year was then gone into with the following result, all shares present being voted for the persons named:

L. F. Barnes, President;
 H. S. Bird, Vice-President;
 J. H. Seymour, Secretary;
 H. S. Bird, Treasurer.
 L. F. Barnes, }
 H. S. Bird, } Directors.
 H. N. Phillips, }

The meeting then adjourned.

(S) H. S. BIRD, Chairman,

(S) J. H. SEYMOUR, Secretary.

"Stockholders' Minutes, pages 72-73."

Exhibit No. 4.

(102) Minutes of stockholders' meeting held Jan. 28, 1909, the same being regular annual meeting of this company.

L. F. Barnes was elected chairman and J. H. Seymour, secretary.

The secretary reported the following shares represented in the meeting:

		Votes.
H. S. Bird, common stock in person,	572	pref'd in person, 560
" " by proxy,	206	" by proxy, 100
L. F. Barnes, " " in person,	287	" in person, 280
	1,065	940

The annual election of officers was then gone into with the following result:

President: L. F. Barnes;
 Vice-President & Treas.: H. S. Bird;
 Secretary: J. H. Seymour;
 Directors: L. F. Barnes, H. S. Bird, H. N. Phillips.
 2,005 votes being cast for each and all of above.

(S) L. F. BARNES,
 Chairman.

(S) J. H. SEYMOUR,
 Secretary.

"Stockholders' Minutes, page 74."

Exhibit No. 5.

Minutes of directors' meeting Williamsburg Knitting Mill Co. held at Peninsula Bank, Sept. 25th, 1909, 9 A. M., pres-

ent, H. N. Phillips and H. S. Bird, the former being elected secretary and the latter as vice-president of the Co. presiding.

(103) The following letter was read, to-wit:

"Richmond, Va., Sept. 7/09.

To H. S. Bird and others,
Directors of the Williamsburg Knitting Mill,

Gentlemen:

I hereby tender my resignation as president and as director of the Williamsburg Knitting Mill Co. (Inc.) to take effect at once.

Respectfully,

(Signed) L. F. BARNES."

On motion made by H. S. Bird and seconded by H. N. Phillips the above resignation was accepted and ordered filed.

On motion, H. S. Bird, vice-president was elected president to succeed L. F. Barnes as such.

On motion M. W. S. Bird of Williamsburg was elected director to succeed L. F. Barnes as such.

On motion J. J. Hennessy was elected secretary of the Co. to succeed J. H. Seymour, deceased.

Mr. Bird reported that Mr. Hennessy had given a fidelity bond in the sum of \$5,000 as book-keeper and secretary.

(S) H. N. PHILLIPS,
Acting Secretary.

(S) H. S. BIRD,
Vice-Prest.
(presiding)

"Directors' Minutes, pages 88/89."

Deed of Trust from Williamsburg Knitting Mill Company to Virginia Trust Company, Trustee.

This Deed, made this first day of January, in the year, one thousand nine hundred and one, between The Williamsburg (104) Knitting Mill Company, a corporation authorized by and existing under the laws of the State of Virginia, party of the first part, and the Virginia Trust Company, a corporation authorized by and existing under the laws of the State of Virginia, party of the second part.

Whereas by virtue of the power vested in them under article five of their charter, the board of directors of the said company, the party of the first part, at a meeting duly held on the twenty-third day of November, 1900, adopted the following resolutions, to-wit:

Be it resolved that this company authorizes the creation and issue of thirty-six coupon bonds hereinafter set forth, and at the same time likewise duly authorized the execution and delivery of a deed of trust on the property of this company to secure the payment of the principal and interest of said bonds; and that the president and secretary of this company make and execute in its corporate name and on its behalf to deliver to the Virginia Trust Company, who is hereby selected trustee a deed of trust to secure the payment of the principal and interest of said bonds; the denomination of said bonds to be five hundred dollars payable ten years after date the same to bear interest at the rate of six per centum per annum, payable semi-annually from the first day of January, 1901, to be of the following form and tenor:

United States No. of America,

Williamsburg Knitting Mill Company,

State of Virginia,

First Mortgage 6% ten year bond, \$500.00

That said bonds shall be signed on behalf of this company by its president and have thereunto affix the corporate seal of this company attested by its secretary."

Now therefore this deed, witnesseth, that in order to carry (105) into effect the said resolutions and to secure equally the payment of the said bonds and coupons to be issued in accordance and under the provision of the foregoing resolution as hereinbefore recited, and provided, and of every fact thereof, as the same shall come payable, and also the fulfillment of the covenants and conditions in said bond and in this deed expressed, and in consideration of the purchase of said bond by the holders thereof and of the sum of one dollar paid to said Williamsburg Knitting Mill Company by the said The Virginia Trust Company, trustee, at or before the sealing of these presents, the receipt whereof is hereby acknowledged, the said Williamsburg Knitting Mill Company, party of the first part, hereby grants, bargains, sells, transfers and conveys unto the said trustee, its successors and assigns forever the following property, to-wit: All that lot of land with the buildings and improvements lately erected thereon and known as the Williamsburg Knitting Mill, situate in the City of Williamsburg, County of James City and State of Virginia, beginning at a point in the line dividing the land of the Chesapeake and Ohio Railway Company and that of the College of William and Mary where the western line of Grigsby street would intersect said dividing line if extended; thence Northerly at right angles to said divid-

ing line and along the prolongation of the Western line of Grigsby street, one hundred and fifteen feet to a point; thence, at right angles, Westerly five hundred and forty feet to a point; thence Southeasterly along a stream bounding the land of the said Chesapeake and Ohio Railway Company on the West to the said dividing line between the lands of the Chesapeake and Ohio Railway Company and the College of William and Mary, and thence Easterly along said dividing line four hundred and ninety-five feet to the point of beginning, being the same lot of land conveyed by the Chesapeake and Ohio Railway Company to the grantors by deed dated August first in the year nineteen hundred, and of record in the office of the clerk of the court for the County of James City and City of Williamsburg, in (Williamsburg), D. B. No. 3, pp. 478-9; together with the engines, boilers, fixtures, machinery and all other equipments constituting the Williamsburg Knitting Mill Company's plant, in and upon the premises herein conveyed, or which may be acquired and placed upon the premises herein conveyed during the continuance of loans hereby secured.

In trust, to secure to the holder or holders of the hereinbefore fully mentioned and described bonds and coupons, whosoever they may be, the payment of the respective sum, or sums, of money evidenced by same at the place and time therein mentioned, without preference, priority or distinction as to lien in favor of any one over the other.

And the said party of the first part hereby covenants as follows, to-wit: that the property hereby conveyed shall be insured in some solvent insurance company, or companies, to be approved by said party of the second part, trustee, in at least the sum of eighteen thousand dollars for the further protection of this trust during the continuance of the same; and the policy or policies, of each insurance shall be assigned to said trustee as further security in the premises; and that it will promptly pay all premiums of insurance upon said property as well as all taxes or assessments upon the same; and should said party of the first part fail to so insure said property, or fail to pay any premiums on such insurance, or any taxes or assessments upon the said property, then said trustee may take out such insurance and pay any premium of such insurance, or taxes and assessments, as the same shall become due, and any sum so paid shall with interest from date to payment be a first (107) lien on the premises hereby mortgaged prior to the debt herein secured.

The party of the first part covenants that if during the continuance of the lien secured hereby, a loss shall occur involving the partial or total destruction of the premises, then the trustee (if so required by the party of the first part and there is then no existing default in the payment of the debts

hereby secured and the performance of the covenants on the part of the said party of the first part) shall apply the insurance money to the reparation or restoration of the said property, according to the plans and directions of the party of the first part, upon certificate of the president of said party of the first part that the sums so certified are due and payable for the repair or rebuilding of said plant or the equipment thereof with machinery or fixtures. But if there should be any such existing default, as aforesaid and such default be not removed within thirty days after the payment of such insurance money, or if the party of the first part should fail to make such request, as aforesaid, within thirty days after such payment then the said trustee shall apply the said insurance money to the payment pro rata of the debts and obligations secured by these presents, which shall in that event become and be deemed at once due and payable.

It is further covenanted and agreed, that the said party of the second part, trustee under these presents, shall not be liable, or in any way responsible for the effecting or not effecting, or its relation to the maintaining, continuing or renewing of any such insurance, nor in respect to the amount or validity thereof, or the solvency of the insurance company in which insurance may be taken out; nor shall said trustee be responsible for the acts of any agents, provided the same have been selected with reasonable care, not for any acts or defaults not accompanied by wilful negligence or bad faith; nor shall said party (108) of the second part be responsible for the due or valid recordation of these presents, it shall be entitled to reasonable compensation for the services of itself and its agents and attorney's, - which shall constitute a prior lien upon the trust subject.

The party of the first part covenants that the buildings, improvements, machinery, appliances and equipments shall be kept in good repair and condition during the continuance of this trust.

If default be made in the payment of any of said coupons when they or it becomes due and payable, or if default be made in the payment of any of the said bonds when they become due and payable, then said trustee shall, upon being required so to do by any holder, or holders, of the said coupons or bonds and after advertising the time and place of sale by publishing the same once a week for four successive weeks in some newspaper published in the City of Richmond, Virginia, and by posting at three or more public places in the City of Williamsburg, proceed to sell the property hereby conveyed by public auction in front of the court-house door of the County of James City and City of Williamsburg, for cash sufficient to pay the costs of executing this trust, the whole of the said debt herein

secured, which shall become due and payable as of the day of sale, together with any sum paid for insurance, taxes or assessments as aforesaid, with interest thereon from the date of such payment and all unpaid taxes or assessments accrued against said property, whether then due or not, and as to the residue upon such terms as said party of the first part in writing may direct, and in default of such direction upon such terms as said trustee may deem best.

Said trustee shall apply proceeds of sale as follows:

First: To the payment of the costs of executing this trust (109) including a commission to said trustee of five per cent. on the first three hundred dollars and two per cent. on balance of purchase money; and all taxes due & assessments chargeable against said property and all sums paid by said trustee for insurance, taxes or assessments on said property with interest as aforesaid.

Second—To the payment of the whole of the said debts herein secured, principal and interest thereon accrued.

Third—The residue, if any, said trustee to pay over to the said party of the first part.

If no default shall be made in the payment to the holders of the said bonds to be issued as herein provided or in the coupons thereon representing the interest on said bonds to grow due at the time and in the manner stipulated in the said bonds and interest coupons and in these presents according to the true intent and meaning of the same, and shall well and truly keep, perform, all and singular the covenants, premises and conditions in said bonds and in this deed of trust expressed to be kept, perform and observe by and on the part of the said party of the first part a good and sufficient deed of release shall be executed to the said party of the first part at its own proper costs and charges.

Witness the following signature of the said Williamsburg Knitting Mill Company by L. W. Lane, Jr., its president, and the corporate seal of said company attested by its secretary.

WILLIAMSBURG KNITTING MILL COMPANY,

By L. W. LANE, JR., President.

[Seal]

[Williamsburg Knitting Mill Company chartered March 20, 1900.]

Attest:

HUGH S. BIRD, Secretary.

STATE OF VIRGINIA, }
 County of James City, } to-wit:

(110) I, T. H. Geddy, a commissioner in chancery for the Circuit Court, City, Williamsburg and County, James City, in the State of Virginia, do certify that L. W. Lane, Jr., president of the Williamsburg Knitting Mill Company, whose name is signed to the foregoing writing bearing date on the first day of January, 1901, has acknowledged the same before me in my county aforesaid.

Given under my hand this 2nd day of January, 1901.

T. H. GEDDY,
 Commissioner in Chancery.

Williamsburg Knitting Mill Company hereby acknowledged itself indebted unto bearer in the sum of five hundred dollars, which sum it promises to pay to the holder hereof at the Peninsula Bank, Williamsburg, Virginia, on the first day of January, in the year one thousand nine hundred and eleven with interest thereon at the rate of six per centum per annum, payable semi-annually on the first day of July and January in each year, until the said principal sum shall be paid, on the presentation and surrender of the interest coupons hereto annexed respectively, as they shall respectively mature. This bond is one of a series of thirty-six bonds of like tenor and date and numbered from one to thirty-six, inclusive, for the sum of five hundred dollars each. The holder hereof is entitled to the security derived from a deed of trust bearing even date herewith and duly recorded, upon all the property, real, personal and mixed including the franchises of said Williamsburg Knitting Mill Company, executed and delivered to the Virginia Trust Company of Richmond, Virginia, in trust to secure to the principal and interest of said bonds, to the provisions of (111) which deed of trust reference is hereby made.

This bond shall not become obligatory until the certificate hereon endorsed has been signed by the trustee.

In testimony whereof, the said company has caused its corporate seal to be hereto annexed and these presents to be duly attested at Williamsburg, Virginia, this first day of January, in the year one thousand nine hundred and one.

WILLIAMSBURG KNITTING MILL COMPANY,

By _____, President.

Attest:

_____, Secretary.

There shall be annexed to each of the said bonds at the time of issue thereof twenty coupons representing the interest installments amounting to the sum of fifteen dollars each, to be authenticated by a fac simile of the signature of the president and secretary of this company, which coupon shall be payable upon presentation on maturity at the Peninsula Bank of Williamsburg, Virginia, and to be of the following form and tenor:

Coupon No. ———.

Williamsburg Knitting Mill Company, will pay fifteen dollars in lawful money of the United States to the bearer on presentation and surrender of this coupon at the Peninsula Bank in the City of Williamsburg, Virginia, being semi-annual interest due — day of ——— on its first mortgage bond No. ———, ———, President.

Attest: ———, Secretary.

That none of the said bonds shall be entitled to the lien or security of said deed of trust until the trustee shall have endorsed thereon a certificate in the following form and tenor:

Trustee's Certificate.

The Virginia Trust Company hereby certifies that the within bond is one of the bonds described in the within mention deed of trust.

THE VIRGINIA TRUST COMPANY, Trustee,
By ———, Vice-President.

STATE OF VIRGINIA, }
County of James City, & City of Williamsburg, } to-wit:

In the office of the clerk of the court of the County and City aforesaid, on the 2nd day of January, A. D., 1901, this deed was presented and with the certificate annexed, admitted to record at (9) o'clock A. M.

Teste: T. H. GEDDY, Clerk.

Bonds secured by this deed duly stamped and canceled according to law.

A Copy—Teste:

T. H. GEDDY, Clerk.

**Deed of Trust from Williamsburg Knitting Mill Company to
Norvell L. Henley, Trustee.**

This Deed, made this 23rd day of November, 1909, between the Williamsburg Knitting Mill Company, a corporation authorized by and existing under the laws of the state of Virginia, party of the first part, and Norvell L. Henley, of the city of Williamsburg, Virginia, who is hereby appointed trustee, party of the second part,

Witnesseth, that for and in consideration of the sum of one (113) dollar in hand paid, and in consideration of the premises, the said Williamsburg Knitting Mill Company, party of the first part, doth grant, bargain, sell, assign, transfer, deliver and convey unto the said trustee, party of the second part, the following property, to-wit:

All that lot of land, with the buildings and improvements thereon, known as the Williamsburg Knitting Mill, situate in the city of Williamsburg, state of Virginia, and bounded as follows: beginning at a point in the line dividing the land of the Chesapeake & Ohio Railway Company and that of the College of William and Mary, where the western line of Grigsby street would intersect said dividing line if extended; thence northerly at right angles to said dividing line and along the prolongation of the western line of Grigsby street one hundred and fifteen (115) feet to a point; thence at right angles westerly five hundred and forty (540) feet to a point; thence southeasterly along a stream bounding the land of the said Williamsburg Knitting Mill Company on the west to the said dividing line between the land of the Williamsburg Knitting Mill Company and of the College of William and Mary; and thence easterly along said dividing line four hundred and ninety-five (495) feet to the point of beginning; the same being the lot of land conveyed to the said Williamsburg Knitting Mill Company by deed from the Chesapeake & Ohio Railway Company dated August 1, 1900, and recorded in the clerk's office of the City of Williamsburg and County of James City in Williamsburg Deed Book No. 3, pages 478-9, to which deed reference is here made;

Together with the engines, boilers, fixtures, machinery, and all other appliances and equipment constituting or in any wise whatsoever connected with the Williamsburg Knitting Mill Company's plant, in and upon the premises hereby conveyed, (114) or which may be acquired and placed upon the said premises during the continuance of this trust; it being the true intent and purpose of this deed to convey to the said trustee the entire plant of the said Williamsburg Knitting Mill Company for the purposes hereinafter set forth.

In trust to secure to the holder, or holders, of the hereinafter described notes the payment of the sum of twelve thousand

(§12,000.00) dollars, as evidenced by three notes of even date herewith, made by the said Williamsburg Knitting Mill Company, endorsed by H. S. Bird and Mrs. M. W. S. Bird, waiving the homestead exemption, the one in the sum of one thousand (§1,000.00) dollars negotiable and payable on or before February 28, 1910, and one in a like sum of \$1,000 payable on or before March 31, 1910, and the other in the sum of ten thousand (§10,000.00) dollars, payable six months after date: all of the said notes being negotiable and payable to the order of The Peninsula Bank of Williamsburg, Virginia, at said bank, and further to secure any renewal of the said \$10,000 note, or any part thereof, or any part of any part thereof, should same be renewed in whole or in part.

It being the true intent and purpose of this deed to secure the payment of the aggregate sum of \$12,000.00 until the said two notes of \$1,000 each shall have been paid off and discharged, and then to secure the said sum of \$10,000.00, or any portion thereof that may be evidenced by any note given in curtailing or renewing the said note for \$10,000.00, should same be renewed.

If default be made in the payment of the said notes, or any of them, as they become due and payable, or in the performance of any of the covenants hereinafter contained, then the said trustee, on being required so to do by the holder of said notes, or any of them, shall sell the property hereby conveyed, and it is covenanted and agreed between the parties aforesaid that in case of a sale, the same shall be made at public auction in front of the courthouse door at Williamsburg, Virginia, after first advertising the time, place and terms thereof, by publishing a notice of such sale once a week for four successive weeks in *The Virginia Gazette*, or some other newspaper published in the city of Williamsburg, or in the vicinity of said property, and by posters at three or more public places in the city of Williamsburg, and upon the following terms, to-wit: For sufficient cash to defray the expenses of executing this trust, including a trustee's commission of five per centum, the fees for drawing and recording this deed, if then unpaid, and to pay off and discharge the said notes, all of which shall be deemed due and payable in the event of such sale, whether actually due or not, and in the event of renewal of the said \$10,000.00 note as aforesaid, then, after the payment of the costs of sale as aforesaid, the said renewal note or notes shall be paid off and discharged; the balance, if any, to be made payable at such time and secured in such manner as to the said trustee may seem best.

The said Williamsburg Knitting Mill Company covenants to pay all taxes, assessments, due and charges upon the said

property hereby conveyed, so long as the said debt herein secured, or any part thereof, remains unpaid, and to keep the said property constantly insured in some solvent insurance company for at least the sum of twelve thousand dollars, such policy or policies to be deposited with the holder of said notes, and to be made payable in the event of loss to the said trustee or holder of said note, as their interest may appear; and in the event of its failure to pay such taxes, assessments, dues and charges, and to insure the said premises as aforesaid, then the holder of said notes may pay same and insure said premises, and any sum so paid shall, with interest from the date of such (116) payment, constitute a part of the lien created by this deed, to be paid out of the proceeds of the property, if sold, or to be recoverable by all the remedies at law or in equity, by which the debt aforesaid may be recoverable; that it will not remove any of the property hereby conveyed from said premises without the written consent of the said trustee and the holder of said notes; that the said buildings, improvements, machinery, appliances and equipment shall be kept in good repair and condition during the continuance of this trust.

If no default be made in the payment of the said notes, or any renewal thereof as aforesaid, or in the performance of any of the covenants herein contained, then, upon the request of any of the party of the first part, this deed shall be released at its own proper costs and charges.

In witness whereof the said Williamsburg Knitting Mill Company has caused these presents to be signed by H. S. Bird, its president, and attested by J. J. Hennessy, its secretary, thereunto duly authorized, constituted and appointed to sign, seal, acknowledge and deliver this deed in its name and on its behalf.

WILLIAMSBURG KNITTING MILL COMPANY,

By H. S. BIRD, President,

[Seal]

[Seal]

Attest: J. J. HENNESSY, Secretary.

STATE OF VIRGINIA, }

County of James City, (to-wit:

I, Jetta C. Thorpe, a notary public in and for the county and state aforesaid, do certify that H. S. Bird, president, and J. J. Hennessy, secretary, of the Williamsburg Knitting Mill Company, whose names as such are signed to the foregoing and (117) annexed writing bearing date on the 23 day of November, 1909, have acknowledged the same to be the act and deed

of the Williamsburg Knitting Mill Company, and their own act and deed, in my county aforesaid. I further certify that my term of office expires November 30, 1911.

Given under my hand this 23rd day of November, 1909.

JETTA C. THORPE,
Notary Public.

D. B. 5, p. 430-1-2.

**MEMORANDUM OF THE COURT AFFIRMING DECISION
AND FINDINGS OF REFEREE LOCKE ON PETI-
TION OF GEO. H. HOLT AND COMPANY.**

Filed June 17th, 1911.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF VIRGINIA.

In the Matter of
Williamsburg Knitting Mill Company, } In Bankruptcy.
Bankrupt.

This case is before the court upon the application to review the rulings of Referee John B. Locke, as set forth in his decision and findings filed herein on the 3rd day of January, 1911, and the conclusion reached thereon by the court is, that the action of the referee in (A) holding that the sprinkler plant put upon the premises of the Williamsburg Knitting Mill Co., the subject of the lien, passed under the after acquired property clause in the mortgage thereof placed thereon in favor of the Peninsula Bank; and (B) that under the amended bankruptcy act of the 25th day of June, 1910, the applicants for review, George H. Holt & Co. are not entitled to their vendor's (118) lien, because of the failure seasonably to record the proper reservation of the same; is in all respects correct, and should be affirmed.

An opinion elaborating these views will be filed with the clerk.

**OPINION OF THE COURT ON THE CLAIM OF GEORGE
H. HOLT AND COMPANY.**

Filed July 1st, 1911.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF VIRGINIA.

In the Matter of
Williamsburg Knitting Mill Company, } In Bankruptcy.
Bankrupt.

Messrs. O. D. Batchelor and Henley & Henley, counsel for trustees in bankruptcy, N. L. Henley, trustee, and the Peninsula Bank of Williamsburg; and S. O. Bland, R. T. Armistead for petitioners, George H. Holt & Co.

This proceeding is now before the court upon the application of George H. Holt & Co. to review the action of Referee John B. Locke, holding the claim of the petitioners, as vendors of a certain sprinkler system furnished to the bankrupt company, not to constitute a lien as against the said sprinkler in the hands of the bankrupt's trustee, because of lack of recollection of the contract of sale prior to the bankruptcy; and also because the sprinkler system is subject to lien by a deed of trust upon the property of the bankrupt, in which the same was installed, to Henley, trustee, to secure a debt to the Peninsula Bank of Williamsburg, under the after acquired property clause (119) contained in said mortgage.

The facts are briefly that under contract dated August 25th, 1909, but not signed by the bankrupt until the 14th of October, 1909, George H. Holt & Co. undertook to install in the bankrupt's mill at Williamsburg, a complete automatic sprinkler system, supply pipes, pressure alarm and other *vales*, a 50,000 gallon tank, and a steel tower for the tank. Holt & Co. were to furnish the labor and materials incident to the work, except as otherwise provided in the specifications, and the bankrupt company was required to "do all necessary trenching, carpenter work and mason work, and cartage and handling material in Williamsburg, Va., also furnish foundations for the 50,000 gallon tank." The sprinkler system was duly installed; the bankrupt erected the concrete foundation on which the 50,000 tank tower was erected, and to which it was securely bolted; pipes were laid under ground running into the plant (a large brick building) bolted to the beams in the building; and the sprinkler was ready for service in March, 1910. In the contract, the following clause reserving title until the full

purchase price was paid, appears: "it is agreed that the said sprinkler system and equipment shall become, be and remain the property of the party of the first part until the title thereto is acquired by the party of the second part as hereinbefore provided, and that said system and equipment, shall, during the period of the agreement herein provided, be, and be considered as personal property and not a part of the realty." Although this contract was duly executed, no memorandum thereof was ever recorded in the clerk's office of the circuit court of the county of James City, and city of Williamsburg, as required by section 2462 of the Code of Virginia, which is as follows: "Every sale or contract for the sale of goods and chattels wherein the title thereto or a lien thereon is reserved until the same be paid for in whole or in part, or the transfer of title is made to de- (120) pend on any condition, and possession be delivered to the vendee, shall, in respect to such reservation and condition, be void as to creditors of and purchasers for value without notice from such vendee until such sale or contract be in writing, signed by both the vendor and vendee, in which the said reservation or condition is expressed, and until and except from the time that a memorandum of said writing, setting forth the date thereof, the amount due thereon, when and how payable, and a brief description of said goods or chattels, be docketed in the clerk's office of the circuit or corporation court of the county or corporation in which said goods or chattels may be."

The facts as to the mortgage to Henley, trustee, in favor of the Peninsula Bank, are substantially that the same was executed on the 23rd day of November, 1909, to secure a loan of \$12,000.00, and duly recorded in the clerk's office of the circuit court of the county of James City and city of Williamsburg. This conveyance was made subsequent to the execution of the contract with Holt & Co., but prior to the completion of the sprinkler system equipment, which was not until March, 1910. The reservation of title in Holt & Co. was not recorded, as aforesaid, and the deed to Henley, trustee, after conveying the lands, buildings and improvements thereon of said Knitting Mills, contained an after acquired clause, as follows:

"Together with the engines, boilers, fixtures, machinery, and all other appliances and equipment constituting or in any wise whatsoever connected with the Williamsburg Knitting Mill Company plant, in and upon the premises hereby conveyed, or which may be acquired or placed upon the said premises during the continuance of this trust; it being the true intent and purpose of this deed to convey to the said trustee the entire plant of the Williamsburg Knitting Mill Company for the purposes hereinafter set forth."

WADDILL, District Judge:

Two questions are presented on the record for consideration by the court; (A) Whether the after-acquired clause in the (121) mortgage of the 23rd of November, 1909, to Henley, trustee, constituted a lien upon the sprinkler system, made a part of the premises, after the execution and recordation of the trust deed; (b) Whether the referee correctly ruled that under the bankruptcy act as amended on the 25th of June, 1910, it was necessary for the vendors Holt & Co. to record their contract, in order to secure a lien as against the bankrupt's estate, in the hands of its trustee. These two positions will be taken up in the order mentioned.

First.

Considering the validity of the lien in favor of the Peninsula Bank, by reason of the after-acquired clause in the mortgage, a preliminary point was raised, namely, that the bank took the deed with actual notice of the existence of the contract in favor of Holt & Co., and hence should not be entitled to a lien. The determination of this question depended largely upon the facts of the case. The referee saw and heard the witnesses testify, and reported in favor of the bank; that is to say, that it was not so circumstanced as to be charged with notice of the right of the vendors to the lien asserted by them. Actual or constructive notice to the bank, or its trustee in the deed of trust, of the rights of Holt & Co., would have been as effective from a legal standpoint, as if the reservation of title had been duly admitted to record. But the referee found that neither the bank or the trustee had actual or constructive notice, and with this finding the court concurs.

Under the after acquired clause in the mortgage, as in this case, any property acquired by the mortgagor subsequent to the date of the execution and delivery of the mortgage, which comes within the general description of property contained therein, became as fully subject to the lien of the mortgage, in (122) equity, as if such property had been owned by the mortgagor on the date of the execution and delivery of the mortgage. The authorities to sustain this position are clear, and within comparatively recent date, the entire subject has been reviewed by the Circuit Court of Appeals of this circuit in two cases, namely, *Union Trust Co. v. Southern Saw Mills Co.*, 166 Fed., 193, 197, 199, 200, and *Tippett v. Wood v. Barham*, 180 Fed., 76, 80; to which cases, with the authorities cited in each, special reference is made as containing a full review of the authorities governing and controlling this subject. In order for the after acquired property clause in the mortgage in ques-

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tion to constitute a valid lien, of course, the property in controversy must come fairly within the terms of such after acquired property clause; and such after acquired lien must be subordinate to any pre-existing valid lien upon the property, at the time it was placed upon the premises. This case, however, is comparatively free from difficulties in this respect, as it is clear that the sprinkler system in question, when installed, became a fixture and such part of the bankrupt's estate, as to form and become a portion thereof, notwithstanding the provision in the contract of sale that it should remain the property of the vendors, and retain its character of personalty; and was hence subject to the after acquired property clause in a deed theretofore executed, fairly embracing the same; and whatever may have been the rights of the vendors in the property thus put upon, and which forms part of the real estate, or the correct method of legally prosecuting and securing such right, had the same been timely and appropriately taken, under the law of the State of Virginia, it is immaterial to determine here, for the reason that the vendors in this instance recorded no lien, and took no steps whatever to save their rights, if any (123) they had, against those of the existing mortgagee; and hence, as between the two claimants of liens, the mortgage takes precedence.

Second.

In determining the correctness of the referee's ruling that it was necessary under the amended bankruptcy act of the 25th of June, 1910, for the petitioners, Holt & Co., the vendors of the sprinkler system in question, to record their contract, in order to make effective their lien as against the bankrupt's estate in the hands of its trustee, it becomes necessary to determine the effect of the amendment and just what title and estate the bankrupt's trustee, in the light of the bankrupt law as amended, takes; or, to state the question differently, to ascertain just what effect the bankruptcy proceeding has, as respects those who hold liens or incumbrances upon, or have an adverse interest to that of the bankrupt in such estate. This subject can not be said to have been free from doubt under either the present act, or that of 1867; that is, the authorities have not been always harmonious, though it may be fairly stated that under both acts, the consensus of opinion, and certainly the better doctrine is, that, except in cases of attachment, sued out, or other lien or incumbrance had and secured within the prescribed time preceding the commencement of proceedings in bankruptcy, and except in cases where the procurement of such lien or disposition of property by the bankrupt is declared to be fraudulent and void, the bankrupt's trustee takes the prop-

erty in the same condition that the bankrupt himself held it, and subject to all equities impressed upon the property, in the hands of the bankrupt, and subject also to all such valid liens or incumbrances, whether created by operation of law or by act of the bankrupt, which existed against the property in the hands of the bankrupt. *Cook v. Tullis*, 18 Wall., 332; *Yeatman v. Savings Institution*, 95 U. S., 764; *Stewart v. Platt*, (124) 101 U. S., 731; *Hauselt v. Harrison*, 105 U. S., 401; *Hewit v. Berlin Machine Works*, 194 U. S., 296; *Thompson v. Fairbanks*, 196 U. S., 516, 526.

The cases cited (and others might be given), firmly maintain the doctrine that a trustee in bankruptcy gets no better title than that which the bankrupt had at the initiation of the bankruptcy proceedings; that he is not a purchaser for value within the meaning of the recordation acts; and that as the vendors title under the conditional sales agreement, as between himself and the bankrupt is good, that it is also good against the bankrupt's estate; and the same may be said of liens generally upon the bankrupt's estate, or claims to such estate, good as between such claimants, or the holders of such liens, and the bankrupt. In such cases, the liens upon, or claims to property in the hands of the bankrupt's trustee, are unaffected by the bankruptcy.

The contrary doctrine is that it is the policy of the bankrupt act to clothe the trustee with title, as against secret claims, liens and equities, and compels every one to comply with the state statutes respecting recordation; and in consequence of failure to do so, to lose their claim upon, or right to liens or equity in and to such estate. Under the bankruptcy law of 1867, the case of *Bank v. Sherman*, 101 U. S., 403, 405, gives strong color to this view of the law. In that case the court said: "The filing of the petition was a caveat to all the world. It was in effect an attachment and injunction. Thereafter all the property rights of the debtor were *ipso facto* in abeyance until the final adjudication. If that were in his favor, they revived and were again in full force. If it were against him, they were extinguished as to him and vested in the assignee for the purposes of the trust with which he was charged. The (125) bankrupt became, as it were, for many purposes, *civiliter mortuus*. Those who dealt with his property in the interval between the filing of the petition and the final adjudication, did so at their peril. They could limit neither the power of the court, nor the effect of the final exercise of its jurisdiction. With the intermediate steps they had nothing to do. The time of the filing of the petition and the final result alone concerned them."

Under the present bankruptcy act, the case of *Mueller v. Nugent*, 184 U. S., 1, 14, likewise apparently maintains the

same view; the Chief Justice at page 14, saying: "It is true of the present law, as it was of that of 1867, that the filing of a petition is a caveat to all the world, and in effect, an attachment and injunction (*Bank v. Sherman*, 101 U. S., 423) and on adjudication, title to the bankrupt's property became vested in the trustee, ss. 70, 21, e, with actual or constructive possession, and placed in the custody of the bankruptcy court."

At first blush, the last two cases would appear to be in direct conflict with those next hereinbefore recited; but a careful analysis of the cases will tend to relieve this apparent difference. The first named cases grew out of transactions incident to the assertion of adverse claims by those claiming title to the property, against the bankrupt or his trustee, or liens upon the same in the hands of the bankrupt's trustee; whereas, the two last named cases apply to controversies arising out of the attempted disposition by the bankrupt of portions of his estate, after the institution of the bankruptcy proceedings. The court of appeals of this circuit applied the doctrine of the two last named cases to the enforcement of the vendor's lien. *Chesapeake Shoe Co. v. Seldner*, trustee, 122 Fed., 593; as did also the court of appeals of the 6th circuit in *Dollie v. Cassell*, (126) 135 Fed., 52, this last case being reported in the Supreme Court under the title of *York Manufacturing Co. v. Cassell*, 201 U. S., 344, 352; and in it the Supreme Court reversed the holding of the lower court on the very question involved herein and adhered to the rulings in the first named cases. This decision is believed to be the last expression of opinion by the Supreme court, and would be conclusive in this state, as the Ohio statute and the Virginia statute are substantially alike, regarding the matters under consideration, that is, as to when it is necessary to make recordation of the vendor's lien to be effective as against the bankrupt or his trustee. The Ohio statute provides that "* * * such condition, in regard to the title so remaining until such payment, shall be void as to all subsequent purchasers and mortgagees in good faith, and creditors, unless such conditions shall be evidenced by writing, signed by the purchaser, lessor, renter, hirer or receiver of the same, * * * until the same is deposited with the clerk of the township where the person signing the instrument resides, &c.;" and the Virginia statute enacts that "every sale or contract for the sale of goods and chattels, wherein the title thereto, or a lien thereon is reserved until the same is paid for in whole or in part, or the transfer of title is made to depend on any condition and possession be delivered to the vendee, shall in respect to such reservation and condition, be void as to creditors of and purchasers for value without notice from such vendee until such sale or contract be in writing, signed by both the vendor and vendee in which said reservation or condition

is expressed, and until and except from the time that a memorandum of said writing, setting forth the date thereof, the amount due thereon, when and how payable, and a brief description of said goods or chattels, be docketed in the clerk's office &c."

(127) In neither of these acts, it will be observed, is it necessary to record the same as between the vendor and vendee, but only against subsequent purchasers and mortgagees in good faith, and creditors under the Ohio act, and under the Virginia act "as to creditors of and purchasers for value without notice from such vendee." The York case made it clear, that only as to those specifically named in the act, that is, subsequent purchasers and mortgagees in good faith, and creditors, was recordation necessary, the court saying:

"We come then to the question whether the adjudication in bankruptcy was equivalent to a judgment, attachment or other specific lien upon the machinery. The Circuit Court of Appeals has held herein that the seizure by the court of bankruptcy operated as an attachment and an injunction for the benefit of all persons having interests in the bankrupt's estate. We are of opinion that it did not operate as a lien upon the machinery as against the York Manufacturing Company, the vendor thereof. Under the provisions of the bankrupt act the trustee in bankruptcy is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued. At that time the right, as between the bankrupt and the York Manufacturing Company, was in the latter company to take the machinery on account of default in the payment therefor. The trustee under such circumstances stands simply in the shoes of the bankrupt and as between them he has no greater right than the bankrupt;" and the court citing from *Thompson v. Fairbanks*, 196 U. S., 516, *supra*, as follows: "under the present bankrupt act, the trustee takes the property of the bankrupt in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt."

(128) In this connection it may be further remarked that the creditors referred to in the Virginia statute, means judgment or lien creditors, and not general creditors, or persons holding unsecured claims. *McCandlish v. Keen*, 13 Grat. (Va.), 615, 638; *Dulaney v. Willis*, 95 Va., 606; *York Manufacturing Co. v. Cassell*, 201 U. S., 344, 351; *Jones on Chattel Mortgages*, 4th Ed., Sec. 245.

The amended act of June 25th, 1910, was passed as a result of the decision in the *York Manufacturing Co.* case, 201

U. S., 344, *supra*, and with a view of meeting the same, as will be presently shown. The section as amended is as follows: "Sec. 8. That section forty-seven, clause two, of subdivision a, of said Act as so amended be, and the same hereby is, amended so as to read as follows:

"Collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; *and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied.*" (Amendment italicised.)

The language used in this amendment is clear and comprehensive, and is viewed by the court unequivocally gives to the bankruptcy proceeding, the effect of a lien, as is contemplated by the York case, *supra*, and the same will suffice to give to those claiming rights by reason of the bankruptcy court proceedings, precedence over an unrecorded vendors lien under the Virginia statute. The amendment does, in fact, give to (129) the bankruptcy proceedings, the force of a "caveat to all the world, and in effect an attachment and injunction," and the same applies to cases as well of the attempted disposition of property after bankruptcy, as to those asserting title to, or lien upon the bankrupt's estate arising out of transactions antedating the bankruptcy. The effect of this change is unquestionably radical and far reaching, as regards the consequence of the institution of bankruptcy proceedings, but it is what Congress had the right to do, and but carries out what, in the judgment of many, should be the effect of such proceeding. It makes the date of the institution of the bankruptcy proceedings, the time as of which rights to, and claims against the estate, should be reckoned with and adjusted, and from and after which period no one creditor or claimant, can secure, or receive preference or advantage over another. The opinion of Mr. Justice Swayne in *Bank v. Sherman*, 101 U. S., 403, 406, *supra*, is particularly appropriate in this respect, the learned justice saying: "The statute is clear and imperative. Its constitutional validity is not questioned. It contains no qualifications. We cannot interpolate what is claimed. Such a function is beyond the sphere of our power and duty. It is

our business to execute the law as we find it, and not to make or modify it. In the disposition of property among creditors, equality is equity. It was the genius and purpose of the statute to secure this result as far as possible from the moment its aid was invoked, whether by debtor or creditor."

This view of the effect of this amendment is taken by Remington, an author of recognized authority on Bankruptcy Laws. In the recent edition of his work, Vol. 3, page 331, the author says: "By the amendment of 1910 to the bankruptcy act, section 47 a (2) 'this rejected doctrine,' that bankruptcy operates as an 'equitable levy' as to property in the custody of the bankruptcy court—has become the accepted doctrine." Moreover, this author shows that Congress by the amendment in question, purposely sought to modify the decision of *York Manufacturing Co. v. Cassell*, *supra*. At page 331 of the same volume (3) the report of the senate judiciary committee on the amendment of the act, is set out in full, stating in terms that its object and purpose was to meet the decision in the *York* case, and to adopt in lieu thereof the views herein taken. Collier on Bankruptcy, 8th Ed., pages 541, 542, refers to this amendment approvingly, and in effect takes the same views of the act that Remington does, though he calls attention to the fact that more logically the amendment should have been to section 70 of the bankrupt act, instead of section 47.

The only decision since the amended act to which the court's attention has been called, is that of *In re Lausman*, 183 Fed., 647, a decision of Judge Evans, of the western district of Kentucky. This opinion is entitled to much weight by reason of the recognized ability and experience of the judge rendering the same. The case involved, however, a small amount, and it is fair to assume was not presented as fully as has been the case here, and was decided before the publication of the recent editions of Remington and Collier, the former of which called special attention to the reason for the senate's action, as above indicated.

It is earnestly insisted that the amended act, if given the interpretation herein accorded it, is unconstitutional as depriving the petitioners of their property without due process of law. With this view the court can not agree, as it is in no respect a violation of one's constitutional rights to require him to conform to the recordation acts of the state in which he has property. The vendors rights in this case, would, under the (131) plain terms of the Virginia statute, have been protected against the bankrupt's execution or other lien creditors, and remained unaffected by bankruptcy proceedings, had they seasonably complied with the statute requiring recordation of their reservation of title. The further suggestion is made that the

amended act should not be given the effect contended for, because of the particular section amended; in other words, it is maintained that the amendment should have been to section 70, sub-sec. 5, instead of to clause 2 of section 47, sub-sec. a of the act. Unquestionably, the amendment should more properly have been to the 70th section of the act, as claimed, which deals with the property as to which the trustee acquires title, instead of section 47, which relates more particularly to the duties of the trustee, but at the same time, it does not follow that it should have been necessarily so made, and that Congress could not have expressed its desire and wishes as well under the section prescribing the duties of the trustee, as that relating to title to property, and this is just what it apparently did, and in terms so clear, comprehensive and specific, that there can be no serious doubt as to its meaning, intention and purpose, and the court feels bound by the plain import of the language used.

The action of the referee sought to be reviewed will be approved and affirmed.

**ORDER DISMISSING PETITION FOR REVIEW OF
GEORGE H. HOLT AND COMPANY.**

Entered and Filed July 27th, 1911.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF VIRGINIA.

In the matter of
Williamsburg Knitting Mill Company, } In Bankruptcy
Bankrupt.

(132) This cause coming on to be heard on the petition of Geo. H. Holt, trading as Geo. H. Holt & Co. for a review of the order of court entered herein by John B. Locke, one of the referees of this court, holding (A) that the sprinkler system equipment put upon the premises of the bankrupt, the subject of petitioners' claim, passed under the after-acquired property clause in the mortgage placed thereon in favor of Peninsula Bank; and (B) that under the amendment to the Bankruptcy Act of June 25th, 1910, the petitioner is not entitled to his reserved vendor's lien or claim of title because of the failure to docket a memorandum of the same as required by the statute law of Virginia; and ordering and determining that the petitioner is only a general creditor of the bankrupt in the sum due him under his contract of sale, to-wit, the sum of sixty-

three hundred and nine dollars (\$6,309.00), with interest from March 1, 1910, and that he can only prove his said claim as such; that he is not entitled to remove the sprinkler system equipment, or any part thereof from the bankrupt's premises, or to receive full payment therefor; that the said sprinkler system equipment is subject to the lien of the Peninsula Bank of Williamsburg, Virginia, under the deed of trust executed from the bankrupt to Norvelle L. Henley, trustee, dated November 23rd, 1909, under which there is a balance due of ten thousand dollars (\$10,000.00) with interest from November 23rd, 1910,—and the court being fully advised, delivered a written opinion which was filed herein on the first day of July, 1911, and in pursuance of said written opinion it is considered, ordered and decreed by the court that said order of the referee is hereby confirmed and the petition for review filed by said George H. Holt, trading as George H. Holt and Co. on the 28th (133) day of April, 1911, is dismissed and it is for this adjudged, ordered and decreed by the court that the sprinkler system equipment put upon the premises of the bankrupt, the subject of petitioner's claim, passed under the after-acquired property clause in the mortgage placed thereon in favor of Peninsula Bank; that under the amendment to the Bankruptcy Act of June 25th, 1910, the petitioner is not entitled to his reserved vendor's lien or claim of title because of the failure to docket a memorandum of the same as required by the statute law of Virginia; that the petitioner is only a general creditor of the bankrupt in the sum due him under his contract of sale, to-wit, the sum of sixty-three hundred and nine dollars with interest from March 1, 1910, and that he can only prove his said claim as such; that he is not entitled to remove the sprinkler system equipment, or any part thereof, from the bankrupt's premises, or to receive full payment therefor; that the said sprinkler system equipment is subject to the lien of the Peninsula Bank of Williamsburg, Virginia, under the deed of trust to Norvelle L. Henley, trustee, dated November 23rd, 1909, under which there is a balance due of ten thousand dollars with interest from November 23rd, 1910, and is also subject to a lien in favor of the trustees in bankruptcy for the benefit of the general creditors of the bankrupt conferred by section eight of the amendments to the Bankruptcy law of June 25th, 1910, amending sub-division (a) of clause two of section 47 of the Bankruptcy Act.

EDMUND WADDILL, JR.,
U. S. District Judge.

Richmond, Virginia, July 27th, 1911.

PETITION FOR APPEAL OF GEORGE H. HOLT, TRADING AS GEORGE H. HOLT AND COMPANY.

Filed July 27th, 1911.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

(134)

In the matter of
Williamsburg Knitting Mill Company, } In Bankruptcy.
Bankrupt.

The above-named George H. Holt, trading as George H. Holt and Company, an intervening petitioner and creditor in the above entitled cause, considering itself aggrieved by the judgment, decree and order made and entered herein on the 27th day of July, 1911, does hereby appeal from such judgment to the United States Circuit Court of Appeals for the Fourth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and said George H. Holt, trading as George H. Holt & Company prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fourth Circuit.

GEORGE H. HOLT,
trading as George H. Holt & Co.
By S. O. BLAND and
R. T. ARMISTEAD, Attys.

ASSIGNMENT OF ERRORS OF GEORGE H. HOLT, TRADING AS GEO. H. HOLT AND COMPANY.

Filed July 27th, 1911.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

(135)

In the matter of
Williamsburg Knitting Mill Company, } In Bankruptcy.
Bankrupt.

And now on the 27th day of July, 1911, comes the said George H. Holt, trading as George H. Holt and Company, by S. O. Bland and R. T. Armistead, his attorneys, and says that the judgment, decree and order heretofore on the 27th day of

July, 1911, entered herein, is erroneous and against the just rights of the said George H. Holt, trading as George H. Holt and Company, for the following reasons, to-wit:

(1) That the court erred in holding that the sprinkler system equipment put upon the premises of the bankrupt, the subject of this petitioner's claim passed under the after acquired property clause in the mortgage given by the bankrupt in favor of Peninsula Bank of Williamsburg.

(2) That the court erred in holding that under the amendment to the Bankruptcy Act of June 25, 1910, the said George H. Holt and Company is not entitled to his reserved vendor's lien or claim of title because of the failure to docket a memorandum of the same as required by the statute law of Virginia.

(3) That the court erred in holding that the said George H. Holt and Company is only a general creditor of the bankrupt in the sum due him under his contract of sale, to-wit, the sum of sixty-three hundred and nine dollars with interest from March 1, 1910, and that he can only prove his claim as such.

(4) That the court erred in holding that the said George H. Holt and Company is not entitled to remove the sprinkler system equipment, or any part thereof from the bankrupt's premises, or to receive full payment therefor.

(5) That the court erred in holding that the said sprinkler system equipment is subject to the lien of the Peninsula (136) Bank of Williamsburg, Virginia, under the deed of trust to Norvelle L. Henley, trustee, dated November 23rd, 1909, under which there is a balance due of ten thousand dollars, with interest from November 23rd, 1910.

(6) That the court erred in holding that the said sprinkler system equipment is subject to a lien in favor of the trustees in bankruptcy for the benefit of the general creditors of the bankrupt conferred by section eight of the amendment to the bankrupt law of June 25th, 1910, amending sub-division (a) of clause two of section 47 of the Bankruptcy Act.

(7) That the court erred in dismissing the petition for review filed by said George H. Holt and Company herein on the 28th day of April, 1911.

(8) That the court erred in holding that the order of the referee John B. Locke to which said petition of review was filed should be confirmed.

(9) That the court erred in holding that George H. Holt and Company is not the owner of the sprinkler system equipment delivered by said Holt and Company under the contract entered into between said company and said bankrupt, and in the original petition mentioned.

(10) That the court erred in holding that the Peninsula Bank of Williamsburg and N. L. Henley, trustee, had no notice or knowledge of the contract between said Holt and Company and said bankrupt.

(11) That the court erred in holding that the amendment of June 25, 1910, to sub-section 2, of section 47a, of the Acts of Bankruptcy, is constitutional, and in so construing said amendment as to deprive the said Holt and Company of the sprinkler system equipment, thereby violating the provisions of Article V. of the Amendments of the Constitution of the United States, and particularly violating that portion of (137) the said amendment which provides that no person shall be deprived of his life, liberty or property without due process of law.

(12) That the court erred in holding that the Amendment of June 25, 1910, to sub-section 2, of section 47a of the Acts of Bankruptcy, applies to, or affects, the contract made between the said Holt and Company and the said bankrupt, which said contract was executed on October 14, 1909, by the bankrupt, said date being sometime prior to the date of said amendment, the said holding of the court this giving a retroactive effect to said amendment.

Wherefore the said George H. Holt, trading as George H. Holt and Company, prays that said judgment, decree and order be reversed and vacated and that said court may be directed to enter a judgment, decree and order directing and authorizing the said George H. Holt, trading as George H. Holt and Company to retake the said sprinkler system equipment and remove the same from the premises of said bankrupt or to have paid to said Holt and Company by the trustees herein the proceeds arising from the sale of the same.

GEORGE H. HOLT,

trading as George H. Holt and Company,

By R. T. ARMISTEAD and

S. O. BLAND, his Attys.

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF BOND.

Entered and filed July 27th, 1911.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

(138)

In the matter of
Williamsburg Knitting Mill Company, } In Bankruptcy.
Bankrupt. } #1060.

This day this cause coming on to be heard on the petition for appeal of George H. Holt, trading as George H. Holt and Company, to the Circuit Court of Appeals for the Fourth Judicial Circuit, and the assignment of errors accompanying the same, and on consideration thereof the court does hereby allow the same, and fixes the appeal bond at \$500.00.

EDMUND WADDILL, JR.,
U. S. Dist. Judge.

Richmond, Va., July 27th, 1911.

APPEAL BOND.

Approved and filed August 3rd, 1911.

Know all men by these presents, that we, George H. Holt, trading as George H. Holt & Company, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto Norvell L. Henley, trustee, The Peninsula Bank of Williamsburg, Virginia; The Virginia Trust Company, Trustee; and H. N. Phillips, J. B. C. Spencer and Willoughby T. Cooke, trustees, their successors, heirs, executors, administrators and assigns, in the just and full sum of five hundred dollars (\$500.00), to be paid to the said Norvell L. Henley, trustee, The Peninsula Bank of Williamsburg, Virginia, The Virginia Trust Company, trustee, H. N. Phillips, J. B. C. Spencer and Willoughby T. Cooke, trustees, their successors, heirs, executors, administrators and assigns, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, the said principal as to his heirs, administrators, executors and assigns, and the said surety as to its successors and assigns, firmly by these presents; and

(139) the said principal hereby waives the benefit of his homestead exemption as to this debt, obligation or contract.

Signed and sealed with our seals and dated this 31st day of July, in the year of our Lord one thousand nine hundred and eleven.

Whereas, on the 27th day of July, 1911, in the District Court of the United States for the Eastern District of Virginia, at Norfolk, in the matter of The Williamsburg Knitting Mill Company, bankrupt, depending in said court, in which suit the said George H. Holt, trading as George H. Holt & Company, is an intervening petitioner, a decree was rendered against the said George H. Holt, trading as George H. Holt & Company, by which decree it was adjudged, ordered and decreed by the court that the sprinkler system equipment put upon the premises of the bankrupt, the subject of the petitioner's claim, passed under the after-acquired-property clause in the mortgage placed thereon in favor of the Peninsula Bank; that under the amendment to the Bankruptcy Act of June 25th, 1910, the said George H. Holt, trading as George H. Holt & Company, was not entitled to his reserved vendor's lien or claim of title, because of the failure to docket a memorandum of the same as required by the statute law of Virginia; that the said George H. Holt, trading as George H. Holt & Company, was only a general creditor of the bankrupt for the sum due him under his contract of sale, to-wit, the sum of \$6,309.00, with interest from March 1st, 1910, and that he could only prove his said claim as such; that he was not entitled to remove the sprinkler system equipment or any part thereof from the bankrupt's premises, or to receive full payment therefor; that the said sprinkler system equipment was subject to the lien of the Peninsula Bank of Williamsburg, Virginia, under the deed of trust to Norvell L. Henley, trustee, dated November 23rd, 1909, under which there is a balance due of (140) ten thousand dollars (\$10,000) with interest from November 23rd, 1910, and was also subject to a lien in favor of the trustees in bankruptcy for the benefit of the general creditors of the bankrupt, conferred by section 8 of the amendments to the Bankruptcy Law of June 25th, 1910, amending Sub-division A, of Clause 2, of Section 47 of the Bankruptcy Act;

And the said George H. Holt, trading as George H. Holt & Company, having been allowed an appeal from the said order, upon the condition that the appellant execute a proper appeal bond in the sum of five hundred dollars (\$500.00), with surety to be approved by the court, and payable and conditioned as the law directs;

Now, therefore, the condition of the above obligation is such that if the said George H. Holt, trading as George H.

Holt & Company, shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good, then this obligation to be void; otherwise to remain in full force and virtue.

GEORGE H. HOLT,

[Seal]

trading as George H. Holt & Company.

By HOWARD F. SMITH, Atty. in fact.

AMERICAN SURETY COMPANY OF
NEW YORK,

[Seal of American Surety Company of New York]

By R. R. GILKEY, Res. Vice-Prest.

Attest:

R. F. BENNETT, Res. Asst. Secy.

Signed and sealed in the presence of—

H. C. HALL,
GEORGE W. TAYLOR.

Approved—

EDMUND WADDILL, JR.,
United States District Judge.

*Extract from the Record Book of The Board of Trustees of
The American Surety Company of New York.*

(141) The first quarterly meeting of the Board of Trustees of the American Surety Company of New York, after the annual stockholders' meeting, was held at the office of the company, No. 100 Broadway, New York City, on Wednesday, January 18, 1911, at 12 o'clock noon.

"The secretary read the report of the nominating committee as follows:

"To the Board of Trustees of the American Surety Company of New York:

"Gentlemen:

"The Committee appointed by the Executive Committee of this company at their meeting held Tuesday, December 13,

1910, for the purpose of nominating officers of the company, for the ensuing year, beg leave to report as follows:

"We nominate for

Place.	Resident Vice-Presidents.	Resident Assistant Secretaries.
Chicago, Ill.	John J. Mitchell, Ernest A. Hamill, Orson Smith, E. S. Lacey, J. V. Clarke, Frederick W. Upham, R. R. Gilkey, R. F. Bennett, F. B. Holdridge.	Roscoe R. Gilkey, Frederick F. Norcross, Kinney Smith, R. F. Bennett, F. B. Holdridge, J. L. Moehle,

"Whereupon, it was

"Resolved, that the Secretary be authorized to cast one ballot on behalf of the trustees present for the officers, members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, and counsel, as recommended by the Nominating Committee for the ensuing year; which was done, and thereupon the aforesaid persons were declared to have been unanimously elected to their respective offices for the ensuing year.

(142) "The following resolution was adopted:

"Resolved, that the Resident Vice-Presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and to deliver and to attach the seal of the company to any and all obligations for or on behalf of the company, such obligations, however, to be attested in every instance by the Resident Assistant Secretary."

STATE OF NEW YORK, }
County of New York, } ss:

I, H. A. Reiss, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the record book of the Board of Trustees of the American Surety Company of New York, with the original record of said board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the original thereof, as recorded in the Minute Book of said company, and do certify that the same is a correct

and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the company, at the City of New York, this 14th day of April, 1911.

H. A. REISS,
Assistant Secretary.

Know all men by these presents, that I, George H. Holt (doing business as Geo. H. Holt & Co.) of the City of Chicago, County of Cook, in the State of Illinois, have made, constituted and appointed, and by these presents do make, constitute and appoint, Howard F. Smith, of the City of Chicago, County of (143) Cook, and in the State of Illinois, my true and lawful attorney for me, and in my name, place and stead, to enforce, protect, secure and preserve my rights and interests of every kind and nature arising or in any way resulting from a certain contract entered into by me, doing business under the name and style of Geo. H. Holt & Co., and Williamsburg Knitting Mill Co., of Williamsburg, Virginia, dated on or about the 25th day of August, 1909, and relating to the installation of a sprinkler equipment in the plant of said Williamsburg Knitting Mill Co., and from a certain guaranty contract attached to the said contract, and signed H. S. Bird; and to collect, and to arrange for the collection of any and all sums or amounts due or to become due from the Williamsburg Knitting Mill Co., to the undersigned, or from the said Bird, or both; to enter into agreements and sign such papers and instruments, as may be, or as he may consider necessary or advisable in carrying out or performing any of the powers hereby conferred; to remove the sprinkler equipment from the plant of the said Williamsburg Knitting Mill Co., or any part of same, to represent and appear for the undersigned in any legal proceedings, creditors' meetings, or otherwise, and in general to do any and all things necessary or advisable for the enforcement, protection, securing and preservation of the rights and interests of the undersigned growing out of the said contracts, or otherwise, and including any bankruptcy, or other proceedings, heretofore commenced, now pending, or hereafter begun against the said Williamsburg Knitting Co. or the said Bird; giving and granting unto the said Howard F. Smith, as said attorney, full power and authority to do and perform all and every act and thing whatsoever, requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as the undersigned might do or could do if personally present at the doing thereof, with (144) full power of substitution and revocation, hereby rati-

fyng and confirming all that the said attorney, or his substitute, shall lawfully do or cause to be done by virtue thereof.

In testimony whereof I have hereunto set my hand and seal this 17th day of September, 1910.

GEORGE H. HOLT, [Seal]

Signed, sealed and delivered in the presence of—

GEORGE W. TAYLOR,
A. M. LEECH.

STATE OF ILLINOIS,}
County of Cook, } ss:

I, Alice M. Leech, a notary public in and for the County and State aforesaid, do hereby certify that George H. Holt, who is personally known to me to be the same person whose name is subscribed above, appeared before me this day in person and stated that he executed the above and foregoing instrument as his free and voluntary act and deed, and for the uses and purposes therein set forth.

Given under my hand and notarial seal this 17th day of September, A. D., 1910.

ALICE M. LEECH,
[Notarial Seal] Notary Public.

CITATION.

UNITED STATES OF AMERICA,}
Fourth Judicial Circuit, } ss:

The President of the United States to Norvell L. Henley, Trustee; The Peninsula Bank of Williamsburg, Virginia; The Virginia Trust Company, Trustee; H. N. Phillips, J. B. C. Spencer and Willoughby T. Cooke, Trustees,—
Greeting:

(145) You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit, to be holden at Richmond, on the 26th day of August next, pursuant to a petition for appeal and assignment of error filed in the Clerk's Office of the District Court of the United States for the Eastern District of Virginia, at Norfolk, by George H. Holt, trading as George H. Holt & Company, in the matter of The Williamsburg Knitting Mill Company, bankrupt, to show cause, if any there be, why the judgment rendered in

said cause on July 27th, 1911, against the said George H. Holt, trading as George H. Holt & Company, denying the claim of said Holt & Company to a certain sprinkler system equipment on said bankrupt's premises, and dismissing the petition of said Holt & Company for review, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edmund Waddill, Jr., Judge of the District Court of the United States for the Eastern District of Virginia, this 1st day of August, in the year of our Lord one thousand nine hundred and eleven.

EDMUND WADDILL, JR.,
United States District Judge.

Acknowledgment of Service.

Service of the above citation and receipt of a copy thereof admitted this 3rd day of August, 1911.

HENLEY & HENLEY,
Attorneys and Solicitors for Norvell L. Henley, Trustee,
The Peninsula Bank of Williamsburg, Va., H. N. Phillips,
J. B. C. Spencer & Willoughby T. Cooke, Trustees.

(146) Service of the within citation and receipt of a copy thereof admitted this 4th day of August, 1911.

CHRISTIAN, GORDON & CHRISTIAN,
Attorneys and Solicitors for The Virginia Trust Company,
Trustee.

STIPULATION OF COUNSEL AS TO RECORD.

Filed August 10th, 1911.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

In the matter of
Williamsburg Knitting Mill Company, } In Bankruptcy.
Bankrupt.

It is hereby stipulated between George H. Holt, trading as George H. Holt and Company, intervening petitioner in the above cause, by his attorneys, Norvelle L. Henley, trustee, and The Peninsula Bank of Williamsburg, Virginia, by their attorneys, J. B. C. Spencer, H. N. Phillips, and Willoughby T. Cooke, trustees in bankruptcy, by their attorneys, and The Virginia Trust Company, trustee, by its attorneys, that the transcript of the record on the appeal in the above-entitled cause shall be made of the following papers:

Petition of George H. Holt and Co., and Exhibit "A" and "B" therewith, answer of Norvelle L. Henley, trustee, answer of H. N. Phillips, J. B. C. Spencer and Willoughby T. Cooke, trustees, answer of the Peninsula Bank of Williamsburg, Va., order of court of Sept. 26, 1910, referring cause to referee, order of referee of April 27, 1911, petition of George H. Holt and Company for review of referee's order, referee's findings (147) of fact and summary of evidence; depositions of Bird, Henley, Hennessy, Phillips, Spencer, and Warburton, together with Bird's examination of October 18, 1910, and exhibits; certificate of referee with copies of minutes; deeds of trust from Williamsburg Knitting Mill Company to The Virginia Trust Company, trustee, and to Norvell L. Henley, trustee, memorandum of court as to its conclusions; opinion of court; order of July 27, 1911, petition of George H. Holt and Company for appeal; assignments of error to court's order; order of court allowing appeal; bond on appeal; citation and admission of service.

It is stipulated that the Williamsburg Knitting Mill Company, a Virginia corporation, engaged in the manufacture of cotton goods, was duly and regularly adjudged a bankrupt on the 7th day of September, 1910, on its voluntary petition, and that H. N. Phillips, J. B. C. Spencer and Willoughby T. Cooke were on the 19th day of September, 1910, duly elected as trustees in bankruptcy in the said cause; and that they duly and regularly qualified as such trustees; and that the Virginia Trust

Company, trustee, filed its answer in said bankruptcy cause on the 18th day of October, 1910.

GEORGE H. HOLT,
trading as George H. Holt and Company,
By R. T. ARMISTEAD and S. O. BLAND,
his attorneys.

NORVELL L. HENLEY, Trustee, and
THE PENINSULA BANK OF
WILLIAMSBURG, VA.

By HENLEY & HENLEY, their Attorneys,
H. N. PHILLIPS,
J. B. C. SPENCER, and
WILLOUGHBY T. COOKE, Trustees,
By O. D. BATCHELOR and

HENLEY & HENLEY, their attorneys.
THE VIRGINIA TRUST COMPANY,
Trustee.

By CHRISTIAN, GORDON & CHRISTIAN,
Its Attorneys.

ORDER TO TRANSMIT RECORD.

(148) Thereupon it is ordered by the court that a transcript of the record and proceedings on the petition of George H. Holt, trading as George H. Holt & Company, in the above entitled matter, together with all things thereunto relating, as stipulated by counsel, be transmitted to the said United States Circuit Court of Appeals for the Fourth Circuit; and the same is transmitted accordingly.

Teste:

JOSEPH P. BRADY, Clerk,
By D. ARTHUR KELSEY,
Deputy Clerk.

CERTIFICATE OF CLERK.

UNITED STATES OF AMERICA,}
Eastern District of Virginia,} ss:

I, Joseph P. Brady, Clerk of the said District Court of the United States for the Eastern District of Virginia, do hereby certify the foregoing to be a full and true record, as stipulated by counsel, of the proceedings and judgment of the said court on the petition of George H. Holt, trading as George H. Holt & Company, in the above entitled matter.

In testimony whereof, I hereunto set my hand and affix
{ Seal of } the seal of the said court, at Norfolk, in said dis-
{ Court } trict, this 22nd day of August, 1911.

JOSEPH P. BRADY, Clerk,
By D. ARTHUR KELSEY,

Deputy Clerk.

Cost of transcript of record, \$66.60.

Paid by Appellant.

And on the same day, to-wit: August 25, 1911, the appearance of S. O. Bland and R. T. Armistead is entered for the appellant.

And on another day, to-wit: August 30, 1911, the appearance of O. D. Batchelor is entered for the trustees in bankruptcy, appellees.

And afterwards, to-wit: on September 1, 1911, the appearance of Norvell L. Henley is entered for Norvell L. Henley, Trustee, &c., appellee.

And afterwards, to-wit: on September 2, 1911, the appearance of Christian, Gordon & Christian is entered for The Virginia Trust Company, Trustee, appellee.

And on another day, to-wit: September 30, 1911, twenty copies of the printed record are filed.

And afterwards, to-wit: on December 16, 1911 (November Term 1911), the cause is continued by the Court to the February Term 1912.

And afterwards at the February Term 1912 of our said Circuit Court of Appeals, to-wit, on the 13th day of February, 1912, the cause came on to be heard and is argued by counsel before Pritchard, Circuit Judge, and Dayton and Rose, District Judges, and submitted.

And afterwards, at the same term, to-wit: on the 20th day of February, 1912, the Court here announced and filed its opinion, which is as follows, to-wit:—

Opinion.

Filed February 20, 1912.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1063.

GEORGE H. HOLT, Doing Business as Geo. H. Holt & Company,
Appellant,
versus

NORVELL L. HENLEY, Trustee; THE PENINSULA BANK OF WILLIAMSBURG, VA., The Virginia Trust Company, Trustee, and H. N. Phillips, J. B. C. Spencer, and Willoughby T. Cooke, Trustees in Bankruptcy of Williamsburg Knitting Mills Company, Bankrupt, Appellees.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk. In Bankruptcy.

[Argued February 13, 1912. Decided February 20, 1912.]

Before Pritchard, Circuit Judge, and Dayton and Rose, District Judges.

S. O. Bland (R. T. Armistead on the brief) for appellant, and Norvell L. Henley and O. D. Batchelor (Henley & Henley on the brief) for appellees.

PER CURIAM:

The able opinion of the learned judge below is reported in 190 Fed., 871. We agree with it. There are only two questions in the

case. Union Trust Co. vs. Southern Saw Mills Co., 166 Fed., 193, and Tippet & Wood vs. Barham, 180 Fed., 76, answer one of them; the act of June 25, 1910, amendatory of the bankrupt law, the other. That act was intended to apply to every bankruptcy, the petition in which was filed after its passage. The conditional vendor in this case had not recorded his contract. By the law of Virginia, a lien creditor or a subsequent purchaser without notice was not bound by it. A trustee for creditors under a conventional assignment might ignore it. Arbuckle Bros. vs. Gates, 95 Va., 802 Congress had the right to make it ineffective as against a trustee in bankruptcy. An act of Congress may to some extent lawfully affect rights which had their inception before its passage.

Wilson vs. Nelson, 183 U. S., 191;

Louisville & Nashville R. R. Co. vs. Mottley, 219 U. S., 480.

Affirmed.

And on another day, to-wit: February 23, 1912, (Same Term), the Court made and entered the following decree, to-wit:—

Decree.

Filed and Entered February 23, 1912.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1063.

GEORGE H. HOLT, Doing Business as Geo. H. Holt & Company,
Appellant,

VS.

NORVELL L. HENLEY, Trustee; THE PENINSULA BANK OF WILLIAMSBURG, VA., The Virginia Trust Company, Trustee, and H. N. Phillips, J. B. C. Spencer, and Willoughby T. Cooke, Trustees in Bankruptcy of Williamsburg Knitting Mills Company, Bankrupt, Appellees.

Appeal from the District Court of the United States for the Eastern District of Virginia.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby affirmed, with costs.

February 23, 1912.

J. C. PRITCHARD.

Petition of Appellant for an Appeal to the Supreme Court of the United States.

Filed March 11, 1912.

United States Circuit Court of Appeals for the Fourth Circuit.

No. 1063.

GEORGE H. HOLT, Doing Business as George H. Holt & Company,
Appellant,

vs.

NORVELL L. HENLEY, Trustee; THE PENINSULA BANK OF WILLIAMSBURG, VIRGINIA; The Virginia Trust Company, Trustee, and H. N. Phillips, J. B. C. Spencer, and Willoughby T. Cooke, Trustees in Bankruptcy of Williamsburg Knitting Mills Company, Bankrupt, Appellees.

The above named appellant, George H. Holt, doing business as George H. Holt & Company, respectfully shows that he is a citizen of the State of Illinois and that the above entitled cause is a controversy arising in bankruptcy proceedings and involves the construction and interpretation of the United States Bankruptcy Act, being Chapter 541, Act of July 1, 1898 (30 Stat. 544) and of said act as amended February 5, 1903, June 15, 1906, and June 25, 1910, and that the said cause is now pending in the United States Circuit Court of Appeals for the Fourth Circuit; that a judgment has been therein rendered on the 23rd day of February, 1912, affirming the decree of the District Court of the United States for the Eastern District of Virginia; that the matter in controversy in said suit exceeds Three Thousand (\$3,000.00) Dollars besides costs, and that this cause is not one in which the United States Circuit Court of Appeals for the Fourth Circuit has final jurisdiction, and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore the said appellant prays that an appeal be allowed him in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit to send the record and proceedings in said cause with all things concerning the same to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by said appellant may be reviewed and if error be found corrected according to the laws and customs of the United States.

GEORGE H. HOLT,
Doing Business as Geo. H. Holt & Co.,
By S. O. BLAND,
His Att'y.

Assignment of Errors.

Filed March 11, 1912.

United States Circuit Court of Appeals for the Fourth Circuit.

No. 1063.

GEORGE H. HOLT, Doing Business as George H. Holt & Company,
Appellant,

VS.

NORVELL L. HENLEY, Trustee; THE PENINSULA BANK OF WILLIAMSBURG, VIRGINIA; The Virginia Trust Company, Trustee, and H. N. Phillips, J. B. C. Spencer, and Willoughby T. Cooke, Trustees in Bankruptcy of Williamsburg Knitting Mills Company, Bankrupt, Appellees.

The appellant, George H. Holt, doing business as George H. Holt and Company, in the above entitled cause, in connection with its petition for appeal herein, presents and files herewith its assignment of errors and says that in the record and proceedings herein there is manifest error and that the United States Circuit Court of Appeals erred in the following respects, to-wit:—

(1). In that the said Circuit Court of Appeals affirmed the judgment of the District Court when it should have rendered judgment in favor of this appellant

(2). In that the said Circuit Court of Appeals by affirming the judgment of the District Court held that the appellant was not entitled to an order directing the trustees herein to deliver to appellant the Sprinkler System Equipment installed by the appellant for the bankrupt herein, title to which Sprinkler System Equipment was reserved by appellant, and in that the said Court adjudged the claim or reservation of title of this appellant to be of no effect as to the creditors of the bankrupt and as to the claim of the Peninsula Bank of Williamsburg, Virginia, under the deed of trust to Norvelle L. Henley, Trustee, dated November 23rd, 1909.

(3). In that the said Circuit Court of Appeals by affirming the judgment of the District Court held that the Trustees herein can retain said Sprinkler System Equipment or the proceeds of the sale thereof for and on behalf of any or all of the creditors of the bankrupt, and in that in so doing said Court of Appeals erred in its construction and interpretation of the United States Bankruptcy Act, being Chapter 541, Act of July 1, 1898 (30 Stat. 544) and of said act as amended February 5, 1903, June 15, 1906, and June 25, 1910.

(4). In that the said Circuit Court of Appeals by affirming the judgment of the District Court held that the deed of trust from the bankrupt to Norvelle L. Henley, Trustee, dated November 23rd, 1909, securing the Peninsula Bank of Williamsburg, Virginia, a debt on which there is a balance due of Ten Thousand Dollars, with interest from November 23rd, 1910, attached to the said Sprinkler

System Equipment either under the after acquired property clause of said deed of trust or as a fixture.

(5). In that the said Circuit Court of Appeals by affirming the judgment of the District Court held that the amendment of June 25th, 1910, to subsection 2, of section 47a, of the United States Act of Bankruptcy (being Chapter 541, Acts of July 1, 1898, 30 Stat. L. 544, as amended February 5, 1903, June 15, 1906 and June 25, 1910), is constitutional, and so construed the said amendment and the said act as to deprive the appellant of the Sprinkler System Equipment without due process of law, thereby violating the provisions of Article V of the Amendments of the Constitution of the United States and particularly that portion of the said Amendment which provides that no person shall be deprived of his life, liberty or property without due process of law.

(6). In that the said Circuit Court of Appeals by affirming the judgment of the District Court so construed the amendment of June 25, 1910, to subsection 2, of section 47a, of the United States Act of Bankruptcy (being Chapter 541, Act of July 1, 1898, 30 Stat. L. 544, as amended February 5, 1903, June 15, 1906 and June 25, 1910), as to give the said amendment a retroactive effect contrary to the intent thereof, thus depriving the appellant of the Sprinkler System Equipment when the same had been installed, and the contract therefor executed, some time prior to said amendment.

(7). In that the said Circuit Court of Appeals by affirming the judgment of the District Court held that the amendment of June 25, 1910, to sub-section 2, of section 47a, of the United States Act of Bankruptcy (being Chapter 541, Act of July 1, 1898, 30 Stat. L. 544, as amended February 5, 1903, June 15, 1906 and June 25, 1910) affected the contract of the appellant with the bankrupt and the right of the appellant to said Sprinkler System Equipment, although no time whatsoever was given by said amendment within which the appellant might record or docket its contract and preserve its right to the said property.

(8). In that the said Circuit Court of Appeals by affirming the judgment of the District Court committed other errors apparent upon an inspection of the record.

Wherefore, the appellant prays that said judgment and decree of said Circuit Court of Appeals may be reversed and that the appellant may have a decree in his favor as herein specified.

GEORGE H. HOLT,
Doing Business as Geo. H. Holt & Co.,
By S. O. BLAND,
His Att'y.

Order Allowing Appeal.

Filed and Entered March 11, 1912.

United States Circuit Court of Appeals for the Fourth Circuit.

No. 1063.

• GEORGE H. HOLT, Doing Business as Geo. H. Holt & Company,
Appellant,

VS.

NORVELLE L. HENLEY, Trustee; THE PENINSULA BANK OF WILLIAMSBURG, VIRGINIA: The Virginia Trust Company, Trustee, and H. N. Phillips, J. B. C. Spencer, and Willoughby T. Cooke, Trustees in Bankruptcy of Williamsburg Knitting Mills Company, Bankrupt, Appellees.

This day this cause coming on to be heard on the petition for appeal of George H. Holt, doing business as Geo. H. Holt & Company, to the Supreme Court of the United States, and the assignment of errors accompanying the same, and on consideration thereof the Court does hereby allow the same, and fixes the appeal bond at \$500.00. And it is further ordered that, on giving said bond conditioned according to law and approved by a Judge of this Court, this order operate as a supersedeas herein.

March 11th, 1912.

J. C. PRITCHARD,
U. S. Circuit Judge.

Appeal Bond.

Filed March 14, 1912.

Know all men by these presents, that we, George H. Holt, trading as George H. Holt & Company, as Principal, and American Surety Company of New York, as surety, are held and firmly bound unto Norvell L. Henley, Trustee, The Peninsula Bank of Williamsburg, Virginia; The Virginia Trust Company, Trustee; and H. N. Phillips, J. B. C. Spencer, and Willoughby T. Cooke, Trustees, their successors, heirs, executors, administrators and assigns, in the just and full sum of Five Hundred Dollars (\$500), to be paid to the said Norvell L. Henley, Trustee, The Peninsula Bank of Williamsburg, Virginia, The Virginia Trust Company, Trustee, H. N. Phillips, J. B. C. Spencer and Willoughby T. Cooke, Trustee, their successors, heirs, executors, administrators and assigns, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, the said principal as to his heirs, administrators, executors and assigns, and the said surety as to its successors and assigns, firmly by these presents; and the said principal hereby waives the benefit of his homestead exemption as to this debt, obligation or contract.

Signed and sealed with our seals and dated this 11th day of March, in the year of our Lord one thousand nine hundred twelve.

Whereas, on the 27th day of July, 1911, in the District Court of the United States for the Eastern District of Virginia, at Norfolk, in the matter of The Williamsburg Knitting Mill Company, Bankrupt, depending in said Court, in which suit the said George H. Holt, trading as George H. Holt & Company, is an intervening petitioner, a decree was rendered against the said George H. Holt, trading as George H. Holt & Company, by which decree it was adjudged, ordered and decreed by the Court that the sprinkler system equipment put upon the premises of the bankrupt, the subject of the petitioner's claim, passed under the after-acquired-property clause in the mortgage placed thereon in favor of the Peninsula Bank; that under the amendment to the Bankruptcy Act of June 26th, 1910, the said George H. Holt, trading as George H. Holt & Company, was not entitled to his reserved vendor's lien or claim of title, because of the failure to docket a memorandum of the same as required by the statute law of Virginia; that the said George H. Holt, trading as George H. Holt & Company, was only a general creditor of the bankrupt for the sum due him under his contract of sale, to-wit, the sum of Six thousand three hundred and nine Dollars (\$6309.00) with interest from March 1st, 1910, and that he could only prove his said claim as such; that he was not entitled to remove the sprinkler system equipment or any part thereof from the bankrupt's premises, or to receive full payment therefor; that the said sprinkler system equipment was subject to the lien of the Peninsula Bank of Williamsburg, Virginia, under the deed of trust to Norvell L. Henley, Trustee, dated November 23rd, 1909, under which there is a balance due of Ten Thousand Dollars (\$10,000) with interest from November 23rd, 1910, and was also subject to a lien in favor of the Trustees in bankruptcy for the benefit of the general creditors of the Bankrupt, conferred by Section 8 of the Amendments to the Bankruptcy Law of June 25th, 1910, amending Sub-division A, of Clause 2, of Section 47, of the Bankruptcy Act,—from which judgment of the United States District Court for the Eastern District of Virginia, the said George H. Holt, trading as George H. Holt & Company, perfected an appeal to the United States Circuit Court of Appeals for the Fourth Circuit;

And whereas, on the 23rd day of February, A. D., 1912, an order was entered by the United States Circuit Court of Appeals for the Fourth Circuit, affirming the judgment of the District Court of the United States for the Eastern District of Virginia, from which said judgement of the United States Circuit Court of Appeals for the Fourth Circuit the said George H. Holt, trading as George H. Holt & Company, has prayed for and has been allowed an appeal from the said order to the Supreme Court of the United States, upon the condition that he execute a proper appeal bond in the sum of Five Hundred Dollars (\$500) with surety to be approved by the Court, and payable and conditioned as the law directs:

Now, therefore, the Condition of the above obligation is such, that if the said George H. Holt, trading as George H. Holt &

Company, shall prosecute his appeal to effect, and answer all damages and costs, if he fail to make his plea good, then this obligation to be void, otherwise to remain in full force and virtue.

Signed and sealed in the presence of:

H. C. HALL.

GEORGE H. HOLT, [SEAL.]
Trading as George H. Holt & Company.

[Seal of the American Surety Company of New York.]

AMERICAN SURETY COMPANY OF
NEW YORK,

By R. F. BENNETT,
Resident Vice-President.

Attest:

J. L. MOEHLE,
Resident Assistant Secretary.

Approved this 14th day of March, 1912.

J. C. PRITCHARD,
U. S. Circuit Judge.

*Extract from the Record Book of the Board of Trustees of the
American Surety Company of New York.*

The first quarterly meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Wednesday, January 17, 1912, at 12 o'clock noon.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees of the American Surety Company of New York:

"GENTLEMEN: The Committee appointed by the Executive Committee of this Company at their meeting held Tuesday, December 12, 1911, for the purpose of nominating officers of the Company, * * * for the ensuing year and until their successors are elected, beg leave to report as follows:

"We nominate for * * *

Place.	Resident Vice Presidents.	Resident Assistant Secretaries.
Chicago, Ill.	John J. Mitchell	Roscoe R. Gilkey
	Ernest A. Hamill	Frederic F. Norcross
	Orson Smith	R. F. Bennett
	E. S. Lacey	J. L. Moehle
	Frederic W. Upham	W. W. Steiner
	R. R. Gilkey	Harold E. Wescott
	R. F. Bennett	
	Harold E. Wescott	

* * * * *

"Whereupon, it was

"Resolved, that the Secretary be authorized to cast one ballot on behalf of the Trustees present for the Officers, members of the Executive Committee, Finance Committee, Committee on Account, Committee on Capital Box, and Counsel, as recommended by the Nominating Committee for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected.

* * * * *

"The following resolution was adopted:

"Resolved, that the Resident Vice Presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by the Resident Assistant Secretary."

* * * * *

STATE OF NEW YORK,

County of New York, ss:

I, F. J. Parry, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 19th day of January, 1912.

[Seal of the American Surety Co. of New York.]

F. J. PARRY,
Assistant Secretary.

Citation.

UNITED STATES OF AMERICA, ss:

To Norvelle L. Henley, Trustee; The Peninsula Bank of Williamsburg, Virginia; The Virginia Trust Company, Trustee, and H. N. Phillips, J. B. C. Spencer, and Willoughby T. Cooke, Trustees in Bankruptcy of Williamsburg Knitting Mills Company, Bankrupt, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days

from the date hereof, pursuant to an appeal filed in the Clerk's Office of the United States Circuit Court of Appeals for the Fourth Circuit wherein George H. Holt, doing business as Geo. H. Holt & Company is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Jeter C. Pritchard Judge of the United States Circuit Court of Appeals for the Fourth Circuit, this 14th day of March, in the year of our Lord one thousand nine hundred and Twelve.

J. C. PRITCHARD,
*Judge of the United States Circuit Court of
Appeals for the Fourth Circuit.*

[Endorsed:] Service of the within citation is hereby acknowledged, and the appearance of the appellees Norvell L. Henley Trustee, and the Peninsula Bank of Williamsburg Virginia is hereby entered. March 15, 1912. Henley & Henley, Att'ys for Henley, Trustee, and Peninsula Bank of Williamsburg, Va. Service of the within citation is hereby acknowledged and the appearance of the appellee, Virginia Trust Company, Trustee, is hereby entered this 14th day of March, 1912. Christian, Gordon & Christian, Att'y- for Virginia Trust Company, Trustee. Service of the within citation is hereby acknowledged and the appearance of the appellees H. N. Phillips, J. B. C. Spencer, and Willoughby T. Cooke, Trustee in bankruptcy of the Williamsburg Knitting Mill Company bankrupt is hereby entered. March 15, 1912. Henley & Henley, O. D. Batchelor, Att'ys for above named trustees in bankruptcy.

Order to Transmit Record.

And thereupon, it is ordered by the Court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the Supreme Court of the United States, and the same is transmitted accordingly.

Teste:—

HENRY T. MELONEY, *Clerk.*

Clerk's Certificate.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true transcript of the record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In testimony whereof I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, on this 20 day of March, A. D., 1912.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,

Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

Endorsed on cover: File No. 23,152. U. S. Circuit Court of Appeals, 4th Circuit. Term No. 1076. George H. Holt, doing business as George H. Holt & Company, appellant, vs. Norvell L. Henley, trustee; The Peninsula Bank of Williamsburg, Virginia, et al. Filed April 8th, 1912. File No. 23,152.



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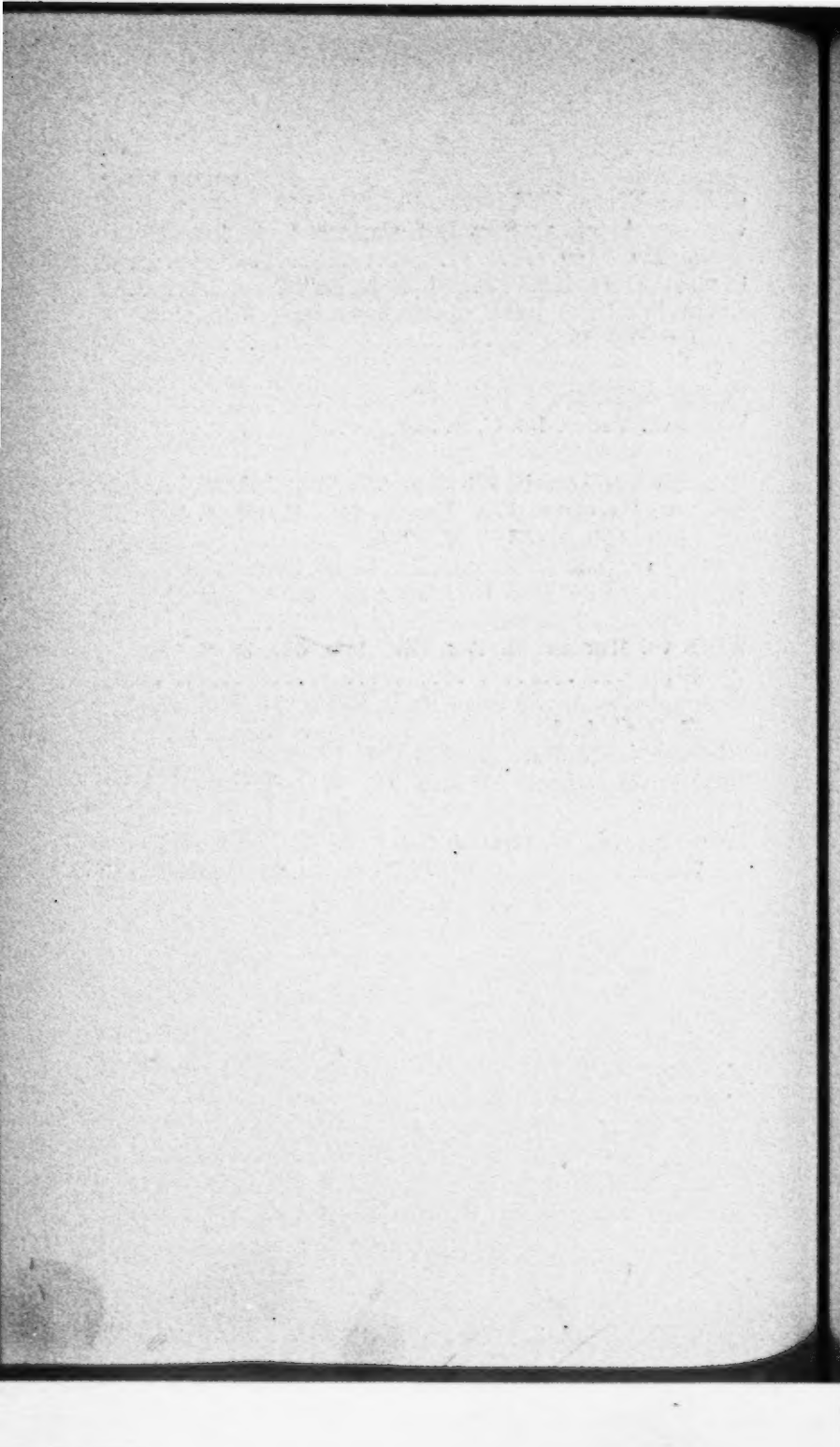
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SUPREME COURT OF THE UNITED STATES

**GEORGE H. HOLT, DOING BUSINESS AS GEORGE
H. HOLT & COMPANY, APPELLANT,**

vs.

**NORVELL L. HENLEY, TRUSTEE, THE PENIN-
SULA BANK OF WILLIAMSBURG, VIRGINIA, THE
VIRGINIA TRUST COMPANY, TRUSTEE, AND H.
N. PHILLIPS, J. B. C. SPENCER, AND WILLOUGH-
BY T. COOK, TRUSTEES IN BANKRUPTCY OF
WILLIAMSBURG KNITTING MILL COMPANY,
BANKRUPT, APPELLEES.**

**APPEAL FROM THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FOURTH CIRCUIT**

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This is an appeal from a decree of the United States Circuit Court of Appeals for the Fourth Circuit affirming a decree of the District Court of the United States for the Eastern District of Virginia; the order of the District Court dismissed the petition of appellant for review of an order entered by John B. Locke, one of the referees of said Court, and held, (a), that a certain sprinkler sys-

tem erected by appellant upon the premises of the Williamsburg Knitting Mill Company, a corporation, bankrupt, passed under the after acquired property clause in the mortgage placed on the realty in favor of the Peninsula Bank; (b), that, under the amendment to the Bankruptcy Act of June 25th, 1910, appellant was not entitled to his reserved vendor's lien or claim of title because of his failure to docket a memorandum of the same as required by the Statute law of Virginia; (c), that the appellant was only a general creditor of the bankrupt in the sum due him under his contract of sale, to-wit, the sum of sixty-three hundred and nine dollars (\$6,309.00), with interest from March 1st, 1910, and that he could only prove his said claim as such; (d), that he was not entitled to remove the sprinkler system equipment, or any part thereof, from the bankrupt's premises, or to receive full payment; and (e), that the said sprinkler system equipment is subject, (1), to the lien of the Peninsula Bank, of Williamsburg, Virginia, under the deed of trust to Norvel L. Henley, trustee, dated November 23rd, 1909, under which there is a balance due of Ten Thousand Dollars (\$10,000.00), with interest from November 23rd, 1910, and (2), to a lien in favor of the trustees in bankruptcy for the benefit of the general creditors of the bankrupt, conferred by section 8 of the Amendments of June 25, 1910, to the Bankruptcy Law, amending subdivision a of clause 2, of section 47 of the Bankruptcy Act. (Record, 96).

See the following pages of the record for the following papers, page 18, order of referee; page 26, referee's

finding of facts, and summary of evidence; page 20, appellant's petition for review; page 87, opinion of District Court affirming referee's order; page 96, decree of District Court affirming referee's order; page 111, opinion of Circuit Court of Appeals on appeal; page 112, decree affirming the decree of the District Court; page 113, petition of the appellant for appeal to this court; page 114, assignment of errors, and page 116, order allowing appeal to the Supreme Court of the United States.

The case briefly stated, is as follows: The Williamsburg Knitting Mill Company of Williamsburg, Virginia, a corporation engaged in the manufacture of cotton goods, hereinafter called Knitting Mill, was adjudged a bankrupt on the 7th day of September, 1910, on its voluntary petition, and H. N. Phillips, J. B. C. Spencer and Willoughby T. Cooke, on the 19th day of September, 1910, were elected and qualified as Trustees in bankruptcy. (Record, 108).

By deed of trust, dated January 1st, 1901, (Record, 76), the Knitting Mill conveyed to the Virginia Trust Company, trustee, its real estate, in trust to secure approximately \$18,000.00. Under this deed of Trust \$17,500.00 of bonds were issued and outstanding on the day of adjudication.

By deed of trust, dated November 23rd, 1909, (Record, 83), the Knitting Mill conveyed to Norvell L. Henley, Trustee, certain real estate specifically described by metes and bounds, with the buildings and improvements thereon, after which description there was the following clause:

"Together with the engines, boilers, fixtures, machinery, and all other appliances and equipment constituting or in any wise whatsoever connected with the Williamsburg Knitting Mill Company's Plant, in and upon the premises hereby conveyed, or which may be acquired and placed upon the said premises during the continuance of this trust; it being the true intent and purpose of this deed to convey to the said Trustee the entire plant of the said Williamsburg Knitting Mill Company for the purposes hereinafter set forth."

This deed of trust purported to secure \$12,000.00 evidenced by three notes of even date therewith, made by the Knitting Mill, endorsed by H. S. Bird and Mrs. M. W. S. Bird, waiving the homestead exemption, one in the sum of One Thousand Dollars (\$1,000), negotiable and payable on or before February 28th, 1910, and one in a like sum of One Thousand Dollars (\$1,000), payable on or before March 31, 1910, and the other in the sum of Ten Thousand Dollars, payable six months after date.

This deed of trust was properly recorded on or about November 23, 1909, and at the time of the failure of the Knitting Mill, the balance secured thereunder was \$10,000.00 (Record, 29). The Peninsula Bank of Williamsburg was and still is the beneficiary thereunder. A part of the loan was used in retiring notes, some of which were endorsed by various parties, and some of which were secured by what were termed warehouse receipts for goods stored with the Williamsburg Warehouse Company, L. F. Barnes, one of the endorsers, declined any longer to endorse the paper which bore his name, unless the same should be curtailed materially. This made it

necessary for the Knitting Mill to secure funds, and while doing so the Company also negotiated for a sum sufficient to take care of other immediate needs; the additional money secured was about \$2,000.00, and at the time of the failure \$2,000.00 had been repaid to the bank. (Record, 29). The deed of trust, therefore, was principally a change of security by the bank and not a new loan.

On, or about, August 26, 1909, a contract was signed and executed by the appellant, George H. Holt, trading as George H. Holt & Company (hereinafter called Holt) for the installation in the Knitting Mill plant at Williamsburg, of a complete automatic sprinkler system equipment, consisting of automatic sprinklers, supply pipes, pressure alarm, and other valves, a 50,000 gallon tank and a steel tower for the tank, devised and designed for the purpose of automatically extinguishing fire, (Record, page 27; see also contract on page 4 et seq).

This contract was signed and acknowledged by Holt on the 26th day of August, 1909, and by the bankrupt on October 14, 1909, (Record, 9 and 26). The installation of this system and equipment was begun about the first Monday in December, 1909, and completed the latter part of March, 1910, (Record, 27). The contract with Holt, was a conditional sales one, whereby the title to, and ownership of, the sprinkler system equipment was to remain in Holt until the same was paid for in cash. The contract contained the following provision:

"It is agreed that the said sprinkler system and equipment shall become, be and remain the

property of the party of the first part until the title thereto is acquired by the party of the second part, as hereinafter provided, and the said system and equipment shall, during the period of the agreement herein provided, be, and be considered, as personal property and not a part of the realty." (Record, 5 and 27).

The contract contained a provision whereby, upon receipt by Holt of the full payment of the sum of \$8,412.00, a bill of sale or other such instrument as might be necessary, was to be executed by said Holt and Company, conveying said sprinkler system equipment to the Knitting Mill, with the further agreement that in the event of the failure of the Knitting Mill to pay the installments provided for in the contract, or to carry out or fulfil any other of the conditions of the agreement with said Holt, in addition to any and all other rights belonging or accruing to said Holt, the said Holt should have the right in such event *"to take out and remove said equipment," and the right to enter upon the premises for that purpose.* (Record, 6). The said Knitting Mill, was further given the *privilege of purchasing said equipment for cash* at any time during the period of the agreement by paying to the said Holt the aggregate amount of installments then unpaid, less unearned interest at six per centum. (Record 7). The said contract required *insurance with loss payable to Holt & Company* and it also contained the further provision:

"It is understood and agreed that the party of the second part shall not be entitled to, and shall not receive or acquire, the title to and ownership of the said equipment until payment of the

full payment of the full amount of the principal, evidenced by said notes, and interest after maturity." (Record pages, 8, 27 and 28).

At the time of the bankruptcy only \$2,103.00 had been paid on the purchase price of this sprinkler system, leaving a balance due of \$6,309.00. (Record, page 28).

The contract between Holt and the Knitting Mill was not recorded, nor was any memorandum thereof docketed in the Clerk's office of James City County, or the City of Williamsburg, or elsewhere. (Record, 28).

The sprinkler system equipment as installed, consisted of a 50,000 gallon tank, erected on a steel tower, which was bolted to a concrete foundation, said concrete foundation having been erected by the bankrupt. The tower was attached to this foundation by "T" bolts inserted, and the holes filled with concrete. Pipes ran from the tank into the mill and *were bolted or screwed* to the ceiling beams in the various rooms and workshops. The tower, tank and foundation were on the outside of the building. (Record, 29).

Some of the officers of the Knitting Mill Company and the Bank were the same at the time the deed of trust with the Bank was negotiated, to-wit; H. N. Phillips, cashier of the Bank, and one of the directors of the Knitting Mill, and H. S. Bird, President of the Company, and one of the directors of the Bank, and the Bank was the institution through which the Knitting Mill conducted its financial affairs. (Record, 30 and 31).

QUESTIONS INVOLVED.

The questions involved are:

1. The right of Holt, pursuant to the reservation of title contained in his contract with the Knitting Mill Company, to remove the sprinkler system equipment installed under said contract, or to receive payment therefor.

2. Whether the said sprinkler system equipment became, either as a permanent fixture, or under the after acquired property clause, or otherwise, subject to the deed of trust dated November 25, 1909, from the Knitting Mill Company to Henley, Trustee.

3. Whether the rights of Holt are in any way affected or altered by the Amendment of June 25, 1910, to section 47, sub-section (a), clause 2 of the Bankruptcy Act; (Sec. 8 of Chap. 412, 36 Stat. at L. 840) the rights, if any, of the Trustees in Bankruptcy, under said amendment to said Sprinkler System; the constitutionality of said amendment, and the proper construction thereof.

MANNER IN WHICH QUESTIONS WERE RAISED.

The manner in which these questions were raised is as follows:

After the failure of the Knitting Mill, Holt filed in the bankruptcy his petition, whereby he prayed for an order authorizing him, pursuant to the terms of his contract, to enter upon the premises of the bankrupt, and to take and remove therefrom the Sprinkler System Equipment (Record 1, et seq. and 4 et seq. for a copy of the

said petition, contract and specifications). To this petition answers were filed by N. L. Henley, Trustee, in the second deed of trust, (Record, 13), by the Trustees in bankruptcy, (Record, 14), and by the Peninsula Bank. (Record, 16).

The matter was referred to John B. Locke, Referee in Bankruptcy, who decided against Holt, (Record, 18); whereupon Holt petitioned for a review of the referee's findings, opinion and order, (Record, 20). The referee's findings of facts will be found on page 26. The Virginia Trust Company filed an answer in the Bankruptcy cause, (Record, 108). The District Court of the United States affirmed the order of the referee (Record, 87), whereupon Holt appealed to the Circuit Court of Appeals of the Fourth Circuit. See Record, 87 to 107, for opinion of District Court, order, petition for appeal, and assignment of errors.

The Circuit Court of Appeals affirmed the judgment of the District Court, and an appeal was taken to this Court. See Record, 111 to 121, for opinion of the Court, order, petition for appeal, assignment of errors, order allowing appeal, appeal bond and citations.

The issues raised are between Holt and the Trustees in Bankruptcy on the one hand, and Holt and the Peninsula Bank of Williamsburg, Virginia, and Henley, Trustee, on the other.

The Virginia Trust Company waived such claims as it might have asserted, if any, to the Sprinkler System Equipment. (Record, 12 and 13).

SPECIFICATION OF ERRORS.

The appellant submits that the United States Circuit Court of Appeals for the Fourth Circuit erred in its order entered herein on the 23rd day of February, 1912, (Record, 112):

1. In that the said Circuit Court of Appeals affirmed the judgment of the District Court when it should have rendered judgment in favor of this appellant.

2. In that the said Circuit Court of Appeals, by affirming the judgment of the District Court, held that the appellant was not entitled to an order directing the trustees herein to deliver to appellant the Sprinkler System Equipment installed by the appellant for the bankrupt herein, title to which Sprinkler System Equipment was reserved by appellant, and in that the said Court adjudged the claim or reservation of title of this appellant to be of no effect as to the creditors of the bankrupt and as to the claim of the Peninsula Bank of Williamsburg, Virginia, under the deed of trust to Norvell L. Henley, Trustee, dated November 23, 1909.

3. In that the said Circuit Court of Appeals by affirming the judgment of the District Court held that the Trustees herein can retain said Sprinkler System Equipment, or the proceeds of the sale thereof, for and on behalf of the creditors of the bankrupt, and in that in so doing said Circuit Court of Appeals erred in its construction and interpretation of the United States Bankruptcy Act, being Chapter 541, Act of July 1, 1898, (30 Stat. 544) and of said act as amended February 5, 1903, June 15, 1906, and June 25, 1910.

4. In that the said Circuit Court of Appeals by affirming the judgment of the District Court, held that the deed of trust from the bankrupt to Norvell L. Henley, Trustee, dated November 23, 1909, securing the Peninsula Bank of Williamsburg, Virginia, a debt on which there is a balance due of Ten Thousand Dollars, with interest from November 23, 1910, attached to the said Sprinkler System Equipment either under the after acquired property clause of said deed of trust or as a fixture.

5. In that the said Circuit Court of Appeals, by affirming the judgment of the District Court, held that the amendment of June 25, 1910, to sub-section 2, of section 47-a, (Sec. 8 of Chap. 412, 36 Stat. at L. 840), of the United States Act of Bankruptcy (being Chapter 541, Acts of July 1, 1898, 30 Stat. L. 544, as amended February 5, 1903, June 15, 1906, and June 25, 1910), is constitutional, and so construed the said amendment and the said act as to deprive the appellant of the Sprinkler System Equipment without due process of law, thereby violating the provisions of Article V of the Amendments to the Constitution of the United States and particularly that portion of the said Amendment which provides that no person shall be deprived of his life, liberty or property without due process of law.

6. In that the said Circuit Court of Appeals by affirming the judgment of the District Court so construed the amendment of June 25, 1910, to sub-section 2, of section 47-a, (Sec. 8 of Chap. 412, 36 Stat. at L. 840), of the United States Act of Bankruptcy (being Chapter 541, Act of July 1, 1898, 30 Stat. L. 544, as amended February

5, 1903, June 15, 1906, and June 25, 1910), as to give the said amendment a retroactive effect contrary to the intent thereof, thus depriving the appellant of the Sprinkler System Equipment when the same had been installed, and the contract therefor executed sometime prior to said amendment.

7. In that the said Circuit Court of Appeals by affirming the judgment of the District Court, held that the amendment of June 25, 1910, to sub-section 2, of section 47-a, (Sec. 8, of Chap. 412, 36 Stat. at L. 840), of the United States Act of Bankruptcy (being Chapter 541, Act of July 1, 1898, 30 Stat. L. 544, as amended February 5, 1903, June 15, 1906, and June 25, 1910), affected the contract of the appellant with the bankrupt and the right of the appellant to said Sprinkler System Equipment, although no time whatsoever was given by said amendment within which the appellant might record or docket its contract and preserve its right to the said property.

ARGUMENT

THE HENLEY DEED OF TRUST DOES NOT COVER THE SPRINKLER SYSTEM.

Henley, Trustee, and the Peninsula Bank, who, for brevity, will be designated herein as the Bank, contend that this system became subject to the trust deed because (a) the system became a real fixture, and consequently a part of the realty described in the trust deed, and (b) because, if not a real fixture, yet the System passed under the after acquired property clause in the deed.

By the express terms of the contract between the appellant and the bankrupt, the Sprinkler System was to remain the property of Holt until the title thereto was acquired by the Knitting Mill, and the Knitting Mill should not be entitled to, and should not *recover or acquire the title to and ownership of the equipment* until payment of the full amount of the principal, evidenced by said notes and interest after maturity. Leave was especially reserved in Holt, in the event of default, to take out and remove the equipment with the right to enter upon the premises for that purpose.

Conceding for argument, that the system would have become a fixture except for these agreements, yet the Law in Virginia undoubtedly is that as between themselves the parties can fix the status of property to the extent that property, otherwise realty, will remain personality.

Shelton vs. Ficklin, 73 Va., (32 Gratt.) 727.

Tunis Lumber Company vs. Dennis, 97 Va., 682.

Auditor vs. Andrews, 69 Va., (28 Gratt.) 115.

Monarch Laundry Co. vs. Westbrook, 109 Va., 382.

1 Minor on Real Property, Sec 27.

Wherein is the position of the Bank better than was the position of the Knitting Mill? It is true that under Chapman vs. Chapman, 91 Va., 397, a trustee in a deed of trust is a purchaser for valuable consideration, but Henley, Trustee, was not a subsequent purchaser, for the deed of trust was recorded on, or about November 23, 1909, while the installation of this system began about the first Monday in December, 1909, and was completed the

latter part of March, 1910, (Referee's finding, Record, 27). The Bank did not, and could not extend credit on the faith of the system, for it was not then installed. The loan was largely a change of security. The deed of trust secured \$12,000.00, of which a little over \$10,000.00 was used in retiring notes held by the Bank (Record, 29); consequently, the position of the Bank at the time of the bankruptcy was better than when the deed of trust was given, for at bankruptcy there was a balance due under said deed of trust of only \$10,000.00. The Sprinkler System was in no respect essential or indispensable, to the operation of the factory, being installed for the extinction of fire. (Record, 27).

Mr. Minor, a professor on the law of real property at the University of Virginia, and an authority on Virginia law, says in his recent work on Real Property:

"Articles annexed, which might otherwise be considered real fixtures and part of the land, may by express agreement be made to retain their personal character."

"For example, if one should annex chattels to another's land by the *license* or *permission* of the latter, there is *prima facie* an agreement that they shall not become real fixtures, or part of the land, and hence they are removable at the pleasure of the owner of the chattels. And so, if the owner of the land after placing a mortgage upon chattels for the purchase price or otherwise, or incumbering the chattels in any other way as by purchasing them with a reservation of title in the vendor, should annex such chattels to his land, there must be implied from the existence of the chattel mortgage or other incumbrance, an intention on his part that the chattels are not to be annexed per-

manently, to the detriment of the mortgagee or lienor.

"Where there is an agreement of this kind, imposing an obligation upon the landowner not to annex the chattels permanently, the obligation rests equally upon a purchaser of the land *with notice* of the agreement or obligation, and the chattel may be severed from the land by the one entitled thereto as against him; but according to the weight of authority, not as against a purchaser of the land for value and *without notice*.

"On the other hand, if the owner of the land first mortgages his land, then mortgages the chattels, and subsequently annexes the chattels to the land, as between the two mortgages, the mortgagee of the chattels has priority, so far as that can be given him without impairing the security previously given to the mortgagee of the land "

1 Minor Real Prop. Sec. 27.

Again, the same author says:

"Hence if the owner of the inheritance die intestate such fixtures ordinarily descend to the heir, together, with the land, and do not, unless previously severed by the owner, go to his personal representative. So also, if he sell or convey the land, not having severed the chattels therefrom, they pass with the land to which they are annexed; *and the same is true if he mortgage it, unless the chattels themselves are subject to mortgage or lien at the time they are annexed.*" (Italics ours).

1 Minor on Real Prop. Sec. 36.

RESERVATION OF TITLE GOOD IN VIRGINIA.

In *Monarch Laundry Co. vs. Westbrook*, 109 Va., 382, the conditional vendor of boilers reserved title and duly docketed his contract. His rights were held to be supe-

rior to those of a subsequent mortgagee. It is true that the contract in that case was docketed in accordance with the provisions of Section 2462 of the Code of Virginia, which is as follows:

“Every sale or contract for the sale of goods and chattels wherein the title thereto or a lien thereon is reserved until the same be paid for in whole or in part, or the transfer of title is made to depend on any condition, and possession be delivered to the vendee, shall, in respect to such reservation and condition, be void as to creditors of and purchasers for value without notice from such vendee until such sale or contract be in writing, signed by both the vendor and vendee, in which the said reservation or condition is expressed, and until and except from the time that a memorandum of said writing, setting forth the date thereof, the amount due thereon, when and how payable, and a brief description of said goods or chattels, be docketed in the Clerk’s office of the Circuit or Corporation Court of the county or corporation, in which said goods or chattels may be.”

The statute, however, added nothing to the validity of the contract. Its only effect was to protect two classes or persons (a) creditors of the vendee, and (b) purchasers for value without notice from such vendee. Creditors intended thereby are lien creditors; *McCandlish vs. Keen*, 54 Va., (13 Gratt.) 615; *Dulaney vs. Willis*, 95 Va., 606; *York Manufacturing Co. vs. Cassell*, 201 U. S. 344, 50 L. Ed. 782; *Jones on Chattel Mortgages*, 4th Ed. Sec. 245. Neither *Henley*, Trustee, nor the Bank is such a creditor. Purchasers, as contemplated by the statute, are subsequent purchasers, for the statute manifestly contemplates a purchaser of the subject of the conditional sale. Neither

the Bank, nor Henley, trustee is a subsequent purchaser, for the deed of trust was recorded on, or about November 23, 1909, while the installation of the system began December, 1909.

The case of *Monarch Laundry Co. vs. Westbrook*, supra, recognizes the sufficiency of the agreement itself to preserve the status of the Chattel as personalty; if the agreement be not recorded or docketed, then it loses its vitality as to creditors of, and purchasers for value. without notice from the vendee. Before this statute, an unrecorded contract of conditional sale of personal property was valid in Virginia, under the authority of *McCombs vs. Donald's Adm'r*, 82 Va., 903.

In *Monarch Laundry Co. vs. Westbrook*, 109 Va., at page 384, the Supreme Court of Appeals of Virginia said:

"We consider it unnecessary to review at length the history, purpose and policy of the Statute, Sec. 2462 of the Code, supra. Suffice it to say, that previous to this statute, the law of the State was, that where a vendor agreed to sell personal property for a price to be paid at a future time, and delivered the possession, but expressly retained title to the property until payment, such an agreement constituted a conditional sale; and though by parol or by an unrecorded instrument, such reservation was valid as against vendees, creditors and subsequent purchasers with or without notice. Whereupon the statute, now Sec. 2462, supra, restricted that doctrine for the protection of innocent third parties by providing that such reservation of title should be void as to them unless recorded in such a way as to give notice."

The statute did not affect the nature of the agreement, nor impair its vitality, except as to those persons therein specifically mentioned, namely, creditors and purchasers; by the statute, certain notice was required to be given in order to preserve the agreement's validity as to these classes of persons, but as to every one else, the agreement remained valid. According to the decision in *Monarch Laundry Company vs. Westbrook*, 109 Va., 382, an agreement like the one in this case preserved to the property, though affixed to the freehold, its character as personalty and when properly docketed or recorded, the compliance with the Statute continued the already valid lien against lien creditors and subsequent purchasers for value without notice.

If the contract, when docketed, remains valid against the classes afforded protection by the statute, namely, lien creditors and purchasers for value without notice, *a fortiori* is the contract valid against all other persons, for the contract does not derive its vitality from the statute, but only loses it as to certain persons if the statute be not followed. Since the prior mortgagee, the Bank and Henley, Trustee, are not included in the classes protected by the statute, then the contract is good as to them, and as to them, the property remains personalty.

STATES REGULATE PROPERTY TRANSFERS.

The right to prescribe what may be held as property, and the terms by which it may be held, is one of the reserved rights of the States, and that which the State validly determines to be property, the Federal Government

must recognize as such. The question of the mode of transferring property is one peculiarly within the Legislative power of the State, in which it is situated. Each state has the power to regulate the manner, and conditions upon which property, both real and personal, situated within its territory, may be acquired and enjoyed, and the manner of its descent, distribution and alienation.

Scott vs. Sandford, 19 How. 393, 15 L. Ed. 691.
Arndt vs. Griggs, 134 U. S. 316, 38 L. Ed. 918.
Walworth vs. Harris, 129 U.S. 355, 32 L. Ed. 712.
Cunnius vs. Reading, 198 U.S. 458, 49 L.Ed. 1125.
Green vs. Van Buskirk, 5 Wall. 307, 18 L.Ed. 599.
Hervey vs. Locomotive Works, 93 U. S. 664, 23 L. Ed. 1003.

The rights of the parties and the validity of the contracts must be determined by the local laws of the State.

In Brown vs. Smart, 145 U. S. 454, 36 L. Ed. 773, the Court said:

“Yet each state so long as it does not impair the obligations of any contract has the power by general law to regulate the conveyance and disposition of all property, personal or real, within its limits and jurisdiction.”

See also Bryant vs. Swofford, 214 U. S. 279, 53 L. Ed. 997.

To the same effect was York Manufacturing Company vs. Cassel, 201 U. S. 344, 50 L. Ed. 782, where the local law of the State of Ohio was enforced, and Holt, Trustee, vs. Crucible Steel Company of America, 224 U. S. 262, 56 L. Ed. 756, where the local law of Kentucky was enforced.

See also *Etheridge vs. Sperry*, 139 U. S. 266, 35 L. Ed. 171, and *Re Baxter and Company*, 154 Fed. 22, (C. C. A. N. Y.) in the last of which cases the Court said:

"All rules concerning the transfer of property are primarily at least a matter of State regulation, and not one of purely commercial law, (*Etheridge vs. Sperry*, 139 U. S. 276) and State laws creating interest in or liens upon property within the State, control the Federal Courts whenever the question arises as to the validity, extent and all the conditions of such an interest or liens. Thus the effect and validity of chattel mortgages and general assignments are determined by the law of the State in which they are made."

We submit that the necessary conclusion from the case of *Monarch Laundry Co. vs. Westbrook* 109 Va., 382, is that a reservation of title on a chattel annexed to the realty is good as against a prior mortgagee of the realty under the State law, and the District Court and the Circuit Court of Appeals should have so held.

WEIGHT OF AUTHORITY SUSTAINS HOLT'S CLAIM.

In a note to *Reynolds vs. Ashby & Son*, 1 British Ruling Cases, at page 678, and in a note to *Tippett and Woods vs. Barham*, 180 Fed. 76, 37 L. R. A. (N. S.) 119, the annotator very properly concludes that,

"The preponderance of authority is to the effect that where the removal of the fixtures will not materially injure the premises, the seller thereof retaining title thereto may assert his right as against a prior mortgagee of the realty."

An examination of the many authorities cited sustain this conclusion of the annotator.

Equitable considerations inevitably lead to the conclusion now sustained by the preponderance of authority. As was said in *Hurxthall vs. Hurxthall*, 45 W. Va. 584, 32 S. E. 237;

"That the realty mortgagee's security is kept whole is all that he can ask as against the property of third parties.

Where the mortgaged personal property is attached to the realty, the mortgagor has only an equity of redemption therein, to which the mortgage on the realty at once attaches."

To the same effect is *Northwestern Mutual Life Insurance Company vs. George*, 77 Minn. 319, 79 N. W. 1028, where the Court said:

"The title to the property, then, not having been divested by the terms of the contract, nor by the performance of the terms thereof, as between the parties, the question arises as to the rights of the plaintiff mortgagee as against the rights of the defendant, George, the assignee of the rights of the Hercules Ice-Machine Company. Appellant claims that George cannot legally remove the machinery without consent of the mortgagee—Why not? *It was not there when plaintiff loaned its money and took security on the premises for its repayment. It was not there when the Fifteen Ton Plant was installed in place of the natural refrigerating system. It was not installed in the building until several years after the date of the mortgagee's loan on the premises. It parted with no security or consideration on the faith that this Sixty Ton Plant would be installed or remain there. It is not an innocent holder of a mortgage, taken without notice, upon land to which the owner had affixed property, personal in its character, before the execution of the mortgage. It has no equities*

which it can invoke in its favor, for the installation of the Fifteen Ton Plant added materially to the value of the security which it took when it loaned the money to Patterson in the first instance." (Italics ours).

See also *Campbell vs. Roddy*, 44 N. J. Eq. 244, 14 Atl. 279, where the Court said:

"As between a lienor, who consents to have the subject matter of his lien transmuted into a shape by which subsequent purchasers and mortgagees are liable to be subjected to deceptive dealings, there seems to be no equitable ground on which the lien should be recognized against an innocent subsequent mortgagee, or purchaser for value. The entire spirit of our registry acts are opposed to the notion that, in such a juncture of affairs, the real estate purchaser would not be regarded as a *bona fide* purchaser against whom the chattel mortgage would be void. But, as already observed, the real estate mortgagees in the present case held their lien before the attachment to the realty of the mortgaged chattels. By force of the annexation they would become subjected to the lien of the real estate mortgage absolutely, unless the lien of the chattel mortgage intervenes. Any property belonging to the mortgagor which he chose to annex to the mortgaged premises became realty. But it is difficult to perceive any equitable ground upon which the property of another which the mortgagor annexes to the mortgaged premises should inure to the benefit of a prior mortgagee of the realty. The real estate mortgagee had no assurance, at the time, he took his mortgage that there would be any accession to the mortgaged property. He may have believed that there would be such an accession; but he obtained no rights, by the terms of his mortgage, to a lien upon anything but the property as it was conditioned at the time of its execution. He could not compel the mortga-

gee to add anything to it. So long, therefore, as he is secured the full amount of the indemnity which he had taken he has no ground for complaint. There is, therefore, no inequity towards the prior real estate mortgage, and there is equity towards the mortgagee of the chattels, in protecting the lien of the latter to the full extent, so far as it will not diminish the security of the former. As already remarked the real estate mortgagee is entitled to any annexation made by his mortgagor of his own property, but is not entitled to the property of others. The property of the mortgagor in these chattels, when he made the annexation, was an equity of redemption. So far as this interest had a value, it became subjected to the lien of the prior real estate mortgage, but the value of his interest was the value of the property subjected to the lien."

Cox vs. Newbern Lighting, Etc. Company, 151 N. C. 62, 65 S. E. 648, is one of the latest cases on this subject. The mortgage, executed June 30, 1906, and recorded July 9, 1906, conveyed two lots, all gas works, pipes, etc., all property of every kind, and "also the rights, easements and additions to the said plant, and equipment and rights that shall be made prior to the time the said bonds are paid off or discharged." Subsequent to the recordation of the mortgage the mortgagor entered into an agreement with the Empire Company by which the Empire Company agreed to furnish certain specifically described apparatus used for the manufacture of gas, and to erect the same in the plant, on the payment of a certain sum in cash, and certain deferred payments. It was agreed that the property should remain the property of the vendor until the deferred payments were made, with right,

upon default, in the vendor to enter upon the premises and plant of the vendee and remove the apparatus, etc. The apparatus was installed and used as a part of the plant. As a result of this installation, one of the original machines was taken out, dismantled and its parts scattered. The building was so changed as to render it unfit for the purposes for which it was originally used.

The court below sustained the claim of the mortgagee as superior to the conditional sale contract, and the Empire Company appealed. The judgment was reversed.

The Court said:

“In our opinion, the judgment of his honor cannot be sustained upon the facts found by him. After a careful consideration of the authorities cited by the learned counsel appearing before us, and the consideration of other authorities our own researches have found, we think a very clear statement of the principle controlling one feature of this case is found in Jones on Chattel Mortgages (5th Ed.) Sec. 133-a as follows: one holding a mortgage of the realty has no equitable claim to chattels subsequently annexed to it. He has parted with nothing on the faith of such chattels. Therefore, the title of a conditional vendor of such chattels, or of a mortgage of them, before or at the time they were attached to the realty, is just as good against the mortgagee of the realty as it is against the mortgagor.”

To the same effect is Davis vs. Bliss, 187 N. Y. 78, 79 N. E. 851.

In this case the agreement between the conditional vendor of real estate and his vendee was that all improvements, repairs or machinery placed upon the prem-

ises should not be removed without the consent of the vendor. The vendee of such real estate installed the gasoline engine sold by the claimant in the building on the premises by placing and bolting the same upon and to a substantial foundation constructed of cement and other materials and by running an exhaust pipe from the floor of the engine room, through the floor, ceiling and roof of the building and by connecting the engine by two underground pipes with a gasoline tank set outside the building, and also by bolts with the shafts in the mill.

The Court said:

"We shall assume that under ordinary circumstances the engine would have become part of the realty. Upon the other hand, we regard it as too well settled to require discussion that the results which would ordinarily flow from attaching such a piece of personal property as this was to the real estate in such a manner as this was attached may be controlled by special circumstances, and the character of the article as personal property be preserved, not only as against the vendee, but also in the absence of statutory provision, as against the mortgagee, owner and, under certain circumstances, the subsequent grantee of the real estate. The agreement between plaintiffs and Lyon clearly and conclusively, as matter of law, indicated the intent of those parties that the engine should remain personal property until it was paid for, and this agreement under the circumstances of this case, was binding upon defendant."

See also *Tift vs. Horton*, 53 N. Y. 377.

In Arctic Ice Machine Co. vs. Armstrong County Trust Company, 192 Fed. 114 (C. C. A. 3rd Circuit), an ice manufacturing machine erected on a foundation of

masonry within a building expressly constructed for it by the bankrupt, enclosed in a brick wall, but in no wise attached to the walls or any other part of the building was held to be personal property under a reservation of title, although the vendor had theretofore instituted a mechanics lien suit for the property in which he treated the property as realty. It was held that the vendor was entitled to the machine.

In the case of *In Re Sunflower State Refining Co.* 195 Fed. 180, (C. C. A. Eighth Circuit), a vendor of certain machinery sold for manufacturing purposes, the title to which was reserved until full payment therefor, was permitted to remove his machinery against a prior mortgage on the realty containing an after acquired property clause, conveying buildings, machinery, engines, boilers, implements, pipe lines, and all property real, personal and mixed, now owned or hereafter to be acquired by the mortgagor that might appertain to, or be used in connection with, said business, wherever situated.

After discussing many cases, the Court said:

“The property was not like rails furnished to a railroad to be placed upon ties imbedded in the railroad right of way and there to remain until worn out, and which are absolutely necessary to be used in connection with the operation of the railroad, nor was the property like steel furnished to a railroad company to be used in the building of a bridge, which bridge was as much a part of the railroad as the rails and road bed itself. The fastening of the property to the foundations by bolts was for the purpose of causing the same to be in a fixed place so that the machinery could be operated, but this mode of fastening was not such

as to charge the Carbondale Machine Company with the knowledge that such machinery became a part of the realty and absolutely necessary to the use of said real estate for the purpose for which the bankrupt was operating its refinery.

"Another fact must not be lost sight of, and that is that the balance due the Carbondale Machine Co. was about \$17,500.00, with interest, which would be lost to it, if it should be held that the property sold by it to the bankrupt had become real estate subject to the lien of the mortgagee. The Supreme Court said, in the language hereinbefore quoted from U. S. V. New Orleans Railroad, *supra*, that the doctrine by which after acquired property is made to serve the uses of the mortgage was intended to subserve the purposes of justice, and not injustice. We are of the opinion, therefore, that upon the facts conceded and found by the trial court the decree below was right and must be affirmed."

In *Wolf vs. Hermann Savings Bank, Kansas City Court of Appeals (Mo.) 153 S. W. 1094*, the conditional vendor of a refrigerating apparatus was allowed to remove it. The Court said:

"The rule now generally recognized is that a conditional sale of machinery put into a plant, covered by a prior mortgage, will be enforced in face of the opposition of the mortgagee, where such machinery may be removed without substantial injury to the free hold, or to express it differently, without substantial injury to the security the mortgagee had at the time of such addition to the plant." (Citing cases).

Again, in the same case, the Court said:

"Why should the defendant bank be allowed to ignore the rights the contract guaranteed to plaintiff, and to appropriate property, the title to

which never passed to the brewing company, the mortgagor? The Bank did not lend its money on the security of plaintiff's property."

Again, in same case, the Court said:

"The tendency of the modern decisions is to give full effect to conditional sales as against the interest of prior mortgagees where, by so doing, the security of the mortgage is not diminished, (citing cases) and to adjust the rights of the parties on equitable principles, even in instances when the severance and removal of the machinery might impair the security of a prior mortgagee to some extent. The old rule that whatever is annexed to the freehold becomes a part of it has been greatly relaxed to meet the exigencies of modern trade and industry."

In *Roberts vs. Caple* (Ala.) 62 So. 343, the owner of a lot, having mortgaged the same to secure part of the purchase money agreed with plaintiff for the erection of a house thereon which should remain plaintiff's property and not become a fixture but be removable by plaintiff at his election. The Court held that such agreement did not impair the mortgage security, and the mortgagee acquired no interest in the house subsequently erected under such agreement.

The Court said:

"We do not doubt the right of the owner in possession of a piece of land, after mortgaging the realty to one party, to enter into a subsequent valid contract or agreement with another to erect a house, piece of machinery, or any other personal property on the land, and contract or agree with such party placing it there that the same should remain the property of the person erecting it or placing it on the land, and removable by him. The

prior mortgagee's security would not be impaired by such a subsequent agreement, and he would acquire no interest as a prior mortgagee in the property subsequently erected or placed upon the realty under such an agreement made in good faith by the owner in possession with a third party."

Sustaining the contentions here made are the following:

Supreme Court of the United States in *York Mfg. Co. vs. Cassell*, 201 U. S. 244.

The Circuit Court of Appeals for the Third Circuit in *Arctic Ice Mach. Co. vs. Armstrong Trust Co.*, 192 Fed. 114, and *New Chester Water Co. vs. Holly Mfg. Co.*, 53 Fed. 19.

The Circuit Court of Appeals for the Eighth Circuit in *Re Sunflower State Refining Co.*, 195 Fed. 180.

The former Federal Circuit Court for Iowa in *Manhattan Trust Co. vs. Sioux City Cable Ry. Co.*, 76 Fed. 658.

And the Courts of the following States:

Alabama in

Roberts vs. Caple, 62 So. 343.

Warren vs. Liddell, 110 Ala. 232, 20 So. 89.

Wood vs. Holly Mfg. Co., (1893), 100 Ala. 326, 46 Am. St. Rep. 56, 13 So. 948.

California in

Hendy vs. Dinkerhoff, (1880) 57 Cal. 3, 40 Am. Rep. 107.

Illinois in

Schumacker vs. Allis, 70 Ill. App. 556.

Ellison vs. Salem Coal & Iron Co. (1890), 43 Ill. App. 120.

Andrews vs. Chandler (1888), 27 Ill. App. 103.

Iowa in

First National Bank vs. Elmore, 52 Iowa 541, 3
N. W. 547.

Idaho in

Anderson vs. Creamery Package Mfg. Co., 8
Idaho 200.

Indiana in

Binkley vs. Forkner, 117 Ind. 176, 19 N. E. 753.

Louisiana in

Baldwin vs. Young, 47 La. Ann. 1466, 17 So. 883.

Michigan in

Harris vs. Hockley, 127 Mich. 46, 86 N. W. 389.
Crippen vs. Morrison, 13 Mich. 23.

Minnesota in

Pioneer Savings and Loan Co. vs. Fuller,
Minn.58, N. W. 831.

Northwestern Mutual L. Ins. vs. George, 77
Minn. 319.

Missouri in

Wolf vs. Herman Savings Bank (Kansas City
Court of Appeals) 153 S. W. 1094.

Defiance Mach. Works vs. Tressler, (1886) 21
Mo. App. 69.

Nebraska in

Edwards & Bradford Lumber Co. vs. Bank.
Neb....., 77 N. W. 765.

New Hampshire in

Langdon vs. Buchanon, 62 N. H. 657.
Cochran vs. Flint, 57 N. H. 514.

New Jersey in

General Electric Co. vs. Transit Equipment Co.
57 N. J., Eq. 460, 42 Atl. 101.

Campbell vs. Roddy, 44 N. J. Eq. 244, 14 Atl. 279.

New York in

Davis vs. Bliss, 187 N. Y. 77, 10 L. R. A. (N. S.) 458.

Tift vs. Horton, 53 N. Y. 377.

Duffus vs. Howard Furnace Co., 40 N. Y. Supp. 925.

Condit vs. Godwin, 95 N. Y. Supp. 1122.

Nichols vs. Potts, 71 N. Y. Supp. 765.

North Carolina in

Cox vs. Newbern Lighting Co., 151 N. C. 62, 65 S. E. 648.

Oregon in

Blanchard vs. Eureka Planing Mill Co., 58 Oregon 37, 113 Pac. 55, 37 L. R. A. (N. S.) 133.

South Carolina in

Padgett vs. Cleveland, 33 S. C. 339, 11 S. E. 1069.

Texas in

Willis vs. Munger, 13 Tex. Civ. App. 607, 36 S. W. 1010.

Vermont in

Page vs. Edwards, 64 Vt. 124, 23 Atl. 917.

Davenport vs. Shants, 43 Vt. 546.

West Virginia in

Hurxthall vs. Hurxthall, 45 W. Va. 584, 32 S. E. 237.

Washington in

German Savings and Loan Society vs. Weber, 16 Wash. 95, 47 Pac. 224.

The Supreme Court of Appeals of Virginia has not considered the question so far as a *prior* mortgagee is concerned, but it has as to a subsequent purchaser in Monarch Laundry Co. vs. Westbrook, 109 Va. 382. The

necessary conclusion from this case is the acceptance by Virginia of the New Jersey Rule and the reasoning upon which the above cases are based. The finding in *Monarch Laundry Co. vs. Westbrook*, supra, is directly opposed to the finding in *Evans vs. Kister* 92 Fed. 828, 35 C. C. A. 28, (Sixth Circuit) and *Detroit Steel Cooperage Company vs. Sistersville Brewing Co.*, 195 Fed. 447, (Fourth Circuit), in which cases the Federal Circuit Court of Appeals held that due compliance with the registration laws themselves would not preserve the status as personalty to the chattel annexed. The reasoning in *Monarch Laundry Co. vs. Westbrook* is identical with the reasoning in the cases sustaining the New Jersey Rule. For instance,

“The reasoning of this line of cases is that if the agreement of the parties and the purposes of justice require that the title to both should be kept separate, the Courts will so regard them, provided always that when the title to the personalty is retained pursuant to statutory provision, the notice to third parties required by the Statute has been given, as is conceded was done in the case at bar. See also *Minor's Real Prop. Sec. 27*, p. 35.”

The Supreme Court of Appeals of Virginia here accepts the statement of Mr. Minor as authority, and the reference is to the section which has been quoted herein at length.

The proviso in the quotation that notice must be given of the reservation was pertinent in that case, for there the rights of a subsequent purchaser were involved. It has been seen that no notice is required by the Statute for any person except lien creditors and subsequent purchasers.

The adoption by the Virginia Court of the New Jersey rule that equitable considerations must prevail is further shown by the attention paid in the Virginia case to the relative value of the land, cost of building, of machinery and aggregate of deed of trust debts. See pages 386-7 of the opinion.

The rule contended for here is in the interest of multiplying factories and industrial development and the Supreme Court of Appeals of Virginia, in the case of *Monarch Laundry Co. vs. Westbrook*, *supra*, recognized the wisdom of the law which permitted things annexed to the realty to remain personalty.

The Court said:

"If the contentions of appellants were sustained, the entire purpose and policy of the statute would be defeated, since its very object is to give dealers like appellee a lien on the property of the kind furnished by him and thereby establish a means of credit to facilitate the conduct of dealing and methods of trade, such a policy being regarded as essential under the conditions growing out of the marvelous development of industries and the multiplication of factories, spoken of in *Morotock Ins. Co. vs. Rodefer*, 92 Va. 747."

The only error the Court fell into in this statement is in attributing the lien to the statute. As has been seen, it exists, independently of the statute, but the statute destroys the lien as to lien creditors and subsequent purchasers unless proper docketing be done.

Attention is also respectfully invited to an article appearing in 1 Va. Law Review 120, written by Henry A. Alexander, of Atlanta, Ga., on "The Conflict Between

Reservations of Title and Prior Mortgages in Southern Territory," and to the full discussion of the many cases cited herein.

From the cases there have been deduced three rules referred to generally as the Massachusetts Rule, the New York Rule, and the New Jersey Rule.

The learned District and Circuit Court of Appeals, in this case applied the so called Massachusetts Rule, while the Virginia authorities which have been referred to follow the New Jersey Rule. The so called Massachusetts Rule adheres most strictly to the doctrine that the rights of the mortgagee are superior and cannot be affected by any agreement to which he is not a party.

The New York and the New Jersey Rules are more liberal:

In a note to Tippet and Wood vs. Barham, 180 Federal 76, 37 L. R. A. (N. S.) 119, 120, the annotator well defines the New York rule as the legal doctrine, that is that, the intention of the parties to the sale that the chattel shall retain the character of personalty will keep it from becoming a fixture, and the New Jersey rule as the Equitable Doctrine, and that is that when the security of the mortgagee of the realty is not diminished, the rights of the seller of the fixture will be recognized. Under either of these rules appellant's claim would be sustained. Every function performed by the mill before the Sprinkler System Equipment was installed would be performed after its removal. Not one cent has been advanced on the faith of the system, nor does it perform one function in the operation of the mill. If it were removed not one

thing would be taken away which was not in existence when the mortgage was made.

If annexation to the freehold be considered an essential element what is the case. The tank and tower are entirely out of the building, pipes are run into the building for the distribution of water in the event of fire, and these pipes are bolted or screwed to the beams. The tower is affixed by T bolts to a concrete base, and the holes are filled in with concrete. This tower supports the tank from which the water is to be distributed by gravity. The concrete foundation had been completed sometime before, and, therefore, there was no mixing of concrete.

Physical annexation of such a character does not render the chattel a fixture, as see *Monarch Laundry Co. vs. Westbrook*, 109 Va., 382 (389), in which the articles in controversy were annexed with concrete, and see also *York Manufacturing Co. vs. Cassell* 201 U. S. 344, where the claim of the vendor of the property was sustained, although an examination of the record will show that there too the property was attached to the freehold by concrete. See also the many cases cited above.

If the cases relied upon by the Circuit Court of Appeals and the District Court correctly propounded the law, we believe they may be distinguished from the case at bar.

CASES RELIED UPON BY THE DISTRICT COURT
AND CIRCUIT COURT OF APPEALS
DISTINGUISHED.

Two decisions of the Circuit Court of Appeals of the Fourth Circuit are relied upon as decisive of the Bank's rights. They are *Union Trust Company vs. Southern Saw Mill & Lumber Co.*, 92 C. C. A. 101, 166 Fed. 193, and *Tippett and Wood vs. Barham*, 103 C. C. A. 430, 180 Fed. 76, 37 L. R. A. (N. S.) 119.

In the first of these cases, machinery and fixtures attached to, used in, and which became a part of a saw mill plant, and, in the second of these cases a stand pipe erected as a part of the water works system of a water distributing company, were held to have become subject to mortgages containing an after acquired property clause, notwithstanding reservations of title on the part of the vendors under contracts which had not been recorded or docketed.

It is well said by the annotator of the full note in 37 L. R. A. (N. S.) at page 125 to the case of *Tippett & Wood vs. Barham*, *supra*, in referring to *Union Trust Company vs. Southern Saw Mills & Lumber Co.*, *supra*, and the case at bar, that

"These decisions, although apparently emphasizing the fact of the existence of the after acquired property clause seem to have been made with the idea of following the Massachusetts rule hereinafter discussed, under which rule the same result would follow regardless of the presence or absence of an after acquired property clause, or of the registration of the contract of conditional sale."

This rule thus referred to is that the rights of the mortgagee cannot be affected by an agreement to which he is not a party.

The Circuit Court of Appeals of the Fourth Circuit in *Tippett & Woods vs. Barham*, *supra*, expressly adopted the Massachusetts rule, so far as a case of that character was concerned. In that case the Court said:

“We think this latter doctrine, referring to the Massachusetts rule, announces the correct principle; especially where the application is, as in the present case, confined to a case wherein the Mortgage (containing an after acquired property clause), has been drawn for the purpose of embracing the entire working plant of the Corporation, including its franchises, as in such cases it is usually true that the mortgage is given at a time when the real estate is but very insufficient security for the debt, and the subsequent accessions are very generally made by the expenditure of the funds derived by reason of the negotiation of the bonds secured by such a mortgage, and the mortgage is made and received in contemplation of such accessions. In such cases, the equities of the beneficiaries under the mortgage should and must attach to such accessions as, under the description contained in the mortgage, are included within it, unless some higher equity or a legal title intervenes.”

It must be noted, however, that in the *Tippett and Wood* case, it was found that the stand pipe was a part of the original construction work of the system of water works intended to be constructed, and an *indispensable* part of such system as without such a standpipe it would have been impossible for the Water Company to have

furnished its consumers with water—that it is one of the *integral parts of the property*, which as a whole, was to constitute the security of the mortgage creditors.

That case is, therefore, distinguishable from the case at bar, in this, that the property there dealt with became an integral part of the realty, and was essential and *indispensable* to the purposes of the mortgaged property. The same reasons exist for the conclusion reached in *Union Trust Co. vs. Southern Saw Mills & Lumber Co.* supra, and other cases cited by the Circuit Court of Appeals in both opinions. For instance:

Porter vs. Steel Co. 122 U. S. 267, 30 L. Ed. 1210, involved bridges a part of a railroad structure.

Dunham vs. Cincinnati, 1 Wall. 254, 17 L. Ed. 584, was a contest over a railroad, the contractor who completed the road claiming priority out of the proceeds of the sale, over bond holders under a prior mortgage, containing after acquired property clause:

Galveston H. & H. R. Co. vs. Cowdrey, 11 Wall. 459, 20 L. Ed. 199, was a contest over rails which had become a part of a railroad, and the mortgage was given priority on account of the necessities of railroad construction for, as the Court said:

“To hold otherwise would render it necessary for a railroad company to borrow money in small parcels as sections of the road were completed, and trust deeds could safely be given thereon. The practice of the Country and its necessities are in coincidence with the rule.”

United States vs. New Orleans & O. R. Co., (*New Orleans & O. R. Co. vs. Mellen*) 12 Wall. 362, 20 L. Ed.

434. This case involved locomotives and cars, and the lien of the conditional vendor was sustained.

Dillon vs. Barnard, 21 Wall. 430, 22 L. Ed. 673. This case is not in point as the claim was to a lien on the funds of the Corporation.

Fosdick vs. Schall, 99 U. S. 250, 25 L. Ed. 342. This case has been quoted from *supra*. In it a conditional vendor of railroad cars was given priority over prior mortgages with an after acquired property clause.

According to the conclusions of the Supreme Court of Appeals of Virginia, in *Monarch Laundry Co. vs. Westbrook*, 109 Va. 382, property though essential to the purposes of the Corporation and attached to the freehold, is susceptible of separate ownership and lien, so that under the authority of the Fosdick case the after acquired property clause would not attach.

Clary vs. Owen, (Mass.) 15 Gray 522; this was a water wheel essential and indispensable to the operation of the mill.

Hunt vs. Bay State Iron Company, 97 Mass. 279, involved rails, a part of a railroad bed.

Thompson vs. Vinton, 121 Mass. 139, involved a water wheel of a mill.

Hopewell Mills vs. Taunton Savings Bank, 150 Mass. 519, involved machinery used in manufacturing cotton cloth.

McFadden vs. Allen 134 N. Y. 489, 19 L. R. A. 446, 32 N. E. 21, contained an element of estoppel, and is not in point.

The case of *Davis vs. Bliss*, 187 N. Y. 79, discussed supra, is more clearly analogous to the case at bar, and the conditional vendor's lien was there protected.

Fuller Warren Co. vs. Harter, 110 Wis. 80, 53 L. R. A. 603, 84 Am. St. Rep. 867, 85 N. W. 698, involved a hot air furnace and necessary connections for heating a dwelling.

Demby vs. Parse, 53 Ark. 526, 12 L. R. A. 87, 14 S. W. 889, involved a dwelling house erected under agreement with a life tenant that it might be removed.

Elkstrom vs. Hall, (Maine) 38 Atl. 106, involved buildings placed on mortgaged premises.

Anderson vs. Creamery Package Mfg. Co. 8, Idaho 200, 56 L. R. A. 554, 101 Am. St. 188, 67 Pac. 493. This case involved machinery placed in a creamery building, and the chattel mortgage was sustained against a prior real estate mortgage.

Meagher vs. Hayes, 152 Mass. 228, 23 Am. St. Rep. 819, 25 N. E. 105, involved a building placed on the mortgaged premises without the consent of the mortgagee, and it is important to note that the question arose after sale of the mortgaged premises although at the sale, notice was given of the claims asserted to the house. While the opinion does not so state, yet the principle asserted in *Gaff. vs. O'Connor*, 16 Ill. (6 Peck) 421 would apply, namely that houses, in common intendment of law, are not fixtures to, but part of, the land, and it is not so much the mode by which they are attached as the uses and purposes for which they are designed, that determines whether they are fixtures or not.

Far more pertinent to this case than any of the Massachusetts cases cited in *Tippett and Wood vs. Barham*, 180 Fed. (supra) is the case of *Carpenter vs. Walker*, 140 Mass. 416, 5 N. E. 160 which involved an engine, boiler, and certain machinery used in making sash and blinds in a factory standing on land of which the defendant was mortgagee. The united weight of the engine and boiler, which were cast together was 5600 pounds. Two iron legs projected from the rear end of the boilers and stood on timbers. There were two small projections, one on each side of the boiler near its front end, but the front end rested on bricks which were built up to form the ash box and laid to prevent fire. A shed was built over the engine and boiler to protect it from weather. This shed had no opening except from the factory, and the engine could not be removed without enlarging this opening or by removing the shed.. The boiler and engine were kept in place by its weight, and the machines were used in the factory. These machines were principally nailed to the floor and to the ceiling, and connected with the shafting by bolts. The Master found that the engine, boiler and machines were personal property, and included in the personal property mortgage, and not in that of the defendant. This ruling was sustained and the Court said:

“But the later decisions of this Commonwealth establish that machines may remain chattels for all purposes, even though physically attached to the free-hold by the owner, if the mode of attachment indicates that it is merely to steady them for their more convenient use, and not to

make them an adjunct of the building or soil. (Citing cases).

We have distinguished above the cases cited to sustain the opinion in *Tippett & Wood vs. Barham*, supra, and the only other cases cited in *Union Trust Co. vs. Southern Saw Mills & Lumber Co.*, 166 Fed. 193, are *In Re Tatem* (D. C.) 110 Fed. 519. *Westinghouse vs. Kansas City R. R. Co.* 137 Fed. 40, 71 C. C. A. 1, and *Evans vs. Kister*, 92 Fed. 828.

In *Re Tatem* (D. C.) 110 Fed. 519, involved simply a question between a conditional sale contract and subsequent bankruptcy. No question of fixtures was involved and under *York Manufacturing Co. vs. Cassell*, 201 U. S. 344, it would have been decided differently.

The case of *Westinghouse vs. Kansas City R. R.* 137 Fed. 40, involved fatal extensions of time by lien claimants to the injury of prior bondholders.

Evans vs. Kister 92 Fed. 827, 35 C. C. A. 28, involved a claim to generating machinery in an electrical railway plant, the machinery being fastened to stone foundations in the Company's power house. Such machinery was indispensable to the use of the plant.

Evans vs. Kister, supra, emphasizes the contention that the local law of Virginia is not in line with, but opposed to, the principles on which *Evans vs. Kister*, supra, *Union Trust Co. vs. Southern Saw Mills & Lumber Co.*, supra, and *Tippett & Wood vs. Barham*, supra, were decided, for in *Evans vs. Kister* even registration of the conditional sale contract would not avail.

This holding is manifestly opposed to *Monarch Laundry Co. vs. Westbrook*, 109 Va. 382, where an engine, boiler and machinery used for the operation of a laundry plant were held to be personalty because of the agreement of the parties to that effect. According to this Virginia case, the intention of the parties must control, and injustice avoided.

In *Evans vs. Kister*, 92 Fed. 828 (836), the Court said:

“Mere registration of an agreement between the mortgager and vendor, preserving the personal character of the property affixed to the freehold mortgaged, will not prevent the attached property from passing under a previously existing mortgage. To prevent such a result, the mortgagee must be a party to the agreement.”

Logically, the Circuit Court of Appeals of the Fourth Circuit were compelled to come to the conclusion that registration itself of the instrument reserving the title would not preserve to the chattel its status as personalty, and it did so in *Detroit Steel Cooperage Co. vs. Sistersville Brewing Co.*, 195 Fed. 447 (C. C. A.) When this last case is read in juxtaposition with *Monarch Laundry Co. vs. Westbrook*, 109 Va. 382, the conclusion is inevitable that the Circuit Court of Appeals has not applied the local law of Virginia.

We have undertaken to show that all of the cases relied on in the cases cited by the Circuit Court of Appeals to sustain its finding in this case involve things essential and indispensable to the operation of the plant and the Virginia law requires that the personalty shall be essen-

tial to the realty before it becomes a fixture.

In *Haskin Wood Co. vs. Cleveland*, 94 Va. 439, at page 447, the Court said:

“The true rule for determining when the machinery and apparatus of a manufactory forms a part of the realty is: that when the machinery is permanent in its character, and essential to the purpose for which the building is occupied, it must be regarded as realty, and passes with the building, and that whatever is essential to the purposes for which the building is used will be considered as a part thereof, although the connection between them is such that it may be severed without physical or lasting injury to either. *Green vs. Phillips*, 26 Gratt. 752; *Shelton vs. Ficklin*, 32 Gratt. 727; *Morotock Ins. Co. vs. Redofer*, 92 Va. 747.”

The reply made by the Bank to this argument is that the Commercial tank supplying the mill with water is attached to the tower. The finding is that Holt did not furnish this tank, that it was done under an independent contract, that it is susceptible of easy detachment without injury, and a tower much less elaborate will answer all purposes (Record, 30). Manifestly, subsequent action of the bankrupt should not deprive Holt of rights theretofore acquired. As was well said in *Monarch Laundry Co. vs. Westbrook*, *supra*, at page 388:

“It is thus shown that the property in question has never lost its character as personalty, and when installed the rights of the vendor and vendee became established, and obviously it would be inequitable and unjust to hold that the vendee could affect the rights of the vendor thus established by any subsequent action upon its part.”

Omitting from present considerations, the after acquired property clause in the mortgage, we respectfully submit that under the weight of authority, and upon equitable considerations, the mortgage of the Bank should be held not to attach to the sprinkler system claimed by appellant.

EFFECT OF AFTER ACQUIRED PROPERTY CLAUSE.

Does the after acquired property clause in the mortgage entitle the Bank to the Sprinkler System as against appellant's claim?

Many of the cases cited and discussed above also discuss the effect of this clause, and it would be useless to repeat them here.

In *Fosdick vs. Schall*, 99 U. S. 235, 25 L. Ed. 339, the following statute of Illinois was under consideration:

"That no mortgage, trust deed, or other conveyance of personal property, having the effect of a mortgage or lien upon such property, shall be valid as against the rights and interests of any third person, unless possession thereof shall be delivered to and remain with the grantee, or the instrument shall provide for the possession of the property to remain with the grantor, and the instrument is acknowledged and recorded as herein-after directed, and every such instrument shall, for the purposes of this act, be deemed a chattel mortgage."

For the above statute see *Meyers vs. Western Car Co.*, 102 U. S. 1, 26 L. Ed. 59.

The Court said in *Fosdick vs. Schall* (*supra*):

"As between the parties, notwithstanding the Illinois Statute the transaction is just what, on its face it purports to be, 'A conditional sale, with a right of rescission on the part of the vendor, in case the purchaser shall fail in payment of his installments,—a contract legal and valid as between the parties, but made with the risk, on the part of the vendor, of his losing his lien,' if it works a legal wrong to third parties. *Murch vs. Wright*, 46 Ill. 488. The question, then, is whether these mortgagees occupy the position of third parties within the meaning of that term as used in this statute.

"They are in no sense purchasers of the cars. The mortgage attaches to the cars, if it attaches at all, because they are after acquired property of the company; but as to that class of property it is well settled that the lien attaches subject to all the conditions with which it is encumbered when it comes into the hands of the mortgagor. The mortgagees take just such an interest in the property as the mortgagor acquired; no more, no less. These cars were 'loose property, susceptible of separate ownership and separate liens,' and such liens, if binding on the railroad company itself, are unaffected by a prior general mortgage given by the company and paramount thereto. The title of the mortgagees in this case, therefore, is subject to all the rights of Schall under his contract."

The contention was also made in the above case that the contract was void because it was not recorded, but this contention was not sustained.

In *Meyers vs. Western Car Co.*, supra, a similar statute of Iowa was under consideration, and the Court said:

"It will thus be seen that the statutes of the two states are substantially alike, unless a differ-

ent meaning is given the term third person, used in the one, from that of creditor or purchaser found in the other. If these terms are the same in legal effect, the principal question involved in this case has already been settled here.

"In *Fosdick vs. Schall* we held that a mortgagee whose mortgage embraced property to be acquired in the future was in no sense a purchaser of such property. His rights were not granted after the property was bought by the mortgagor. He got nothing by this provision in his mortgage except what the mortgagor himself had acquired. He paid nothing for his new security. He took as mortgagee just such title as the mortgagor had; no more, no less. The Code of Iowa section 1283, authorized mortgages of property afterwards to be acquired, and made them as valid and effectual as if the property were in possession at the time of the execution thereof; but this does not change the case. The question still is, what property had been acquired to which the mortgage can attach.

"We think therefore, that the word 'purchasers' in the Iowa statute gives the appellants no rights over what they would be entitled to under like circumstances in Illinois."

To the same effect see *Evans vs. Kister*, 92 Fed. 828, where the Court, per Lurton J., said:

"A previously existing mortgagee of the property of the railway company is, therefore, not a creditor within the meaning of section 2496. Neither is such a mortgagee a subsequent purchaser for value without notice."

See also to effect that prior mortgagee is not a subsequent purchaser, *Blanckard vs. Eureka Planing Mill Co.*, 58 Oregon 37, 113 Pac. 55.

Chase vs. Tacoma Box Co., (Wash.) 39 Pac. 639.

In *York Manufacturing Co. vs. Cassell*, 201 U. S. 214, the Court said:

“The mortgage of Waight & Ames cannot be a lien on the machinery sold by the York Manufacturing Co., *supra*, because the mortgage was prior to the time when any portion of such machinery was placed upon the land. There was no clause in the mortgage covering after acquired property, and, in any event, the mortgage would not cover property so acquired, the title to which, as in this case, was reserved to the vendor. This was the ruling of the District Court, and no appeal was taken therefrom by the mortgagees.”

In *New Orleans vs. Mellen*, 79 U. S. 434, 12 Wall 362, the Court said:

“The appellants contend, in the next place, that the decision upon the facts was erroneous; that the mortgages being prior in date to the bond given for the purchase money of these locomotives and cars, and being expressly made to include after acquired property, attached to the property as soon as it was purchased, and displaced any junior lien. This, we apprehend, is an erroneous view of the doctrine by which after acquired property is made to serve the uses of a mortgage. *That doctrine is intended to subserve the purposes of justice, and not injustice. Such an application of it as is sought by the appellants would often result in gross injustice.* A mortgage intended to cover after acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If that property is already subject to mortgages or other liens, the general mortgage does not displace them, although they may be junior to it in point of time. It only attaches to such interest as the mortgagor acquires; and if he purchase property and give a mortgage for the purchase money, the deed which

he receives and the mortgage which he gives are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage or judgment, or recognizance, can displace such mortgage for purchase money. And in such cases a failure to register the mortgage for purchase money makes no difference. It does not come within the reason of the registry laws. These laws are intended for the protection of the subsequent, not prior, purchasers and creditors."

To the same effect is the law of Virginia; see *Murray vs. Farmville, etc.*, 101 Va. 262, in which case the Court said:

"At common law a valid mortgage could not be made to cover after acquired property, but it is otherwise in equity for the reason that what is in form a conveyance operates in equity by way of present contract merely, to take effect and attach as soon as the property comes into being. The same principles of construction apply to a mortgage upon future acquisitions of property by a corporation that would apply to a like instrument executed by an individual."

See also *First National Bank vs. Turnbull*, 73 Va. (32 Gratt.) 695, where the Court said:

"The law permits such grants to take effect upon the property when it is brought into existence, in fulfilment of an express agreement, if founded on a good consideration, and it appears that no rule of law is infringed, *and the rights of third persons are not prejudiced.*" (Italics ours). See also to same effect:

General Electric Co. vs. Transit Equipment Co., 57 N. J. Eq. 471.

Cox vs. Newbern Electric Co., 151 N. C. 62.

Hickson Lumber Co. vs. Gay Lumber Co., 150, N. C. 282.

Binkley vs. Forkner, 117 Ind. 176.

The above quotations from the Virginia authorities are in complete accord with Beale vs. White, 94 U. S. 382, 24 L. Ed. 173, in which the Court said:

“Courts of equity will, in certain cases, give effect to a mortgage of property to be acquired subsequently, where no rule of law is infringed and the rights of third persons are not prejudiced. Pennock vs. Coe, 23 How. 117, 16 L. Ed. 436.

“Grants or conveyances of this kind may, in certain cases, be valid, subject to those conditions; or, to speak more accurately, the law will permit the grant or conveyance to take effect upon the property when it is brought into existence and belongs to the grantor, in fulfilment of an express agreement, if founded on a good consideration, and it appears that no rule of law is infringed and the rights of third persons are not prejudiced. Story Eq. Jur. 9th Ed. Sec. 1040; Durham vs. R. Co., 1 Wall. 254, 17 L. Ed. 584; U. S. vs. R. Co., 12 Wall. 362, 20 L. Ed. 434.”

THE PROPERTY MUST BE ACQUIRED AND PLACED ON THE PREMISES.

The after acquired property clause in the Bank deed of trust purports to convey the engines, boilers, fixtures, machinery, and all other appliances and equipment constituting or in any wise whatsoever connected with the Williamsburg Knitting Mill Company's plant, in and upon the premises hereby conveyed, *or which may be acquired and placed upon the said premises during the continuance of the trust.*

Concerning the future accessions, the deed of trust is plain. The property must be subsequently "*acquired and placed*" upon the premises. Under the authorities the Sprinkler System was not "*acquired.*"

See York Manufacturing Company vs. Cassell, *supra*.

Particular attention is called to the language of the Supreme Court of the United States in Railway vs. Mellen, *supra*, where the Court says:

"A mortgage intended to cover after acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If that property is already subject to mortgages or other liens, the general mortgage does not displace them, although they may be junior to it in point of time. It only attaches to *such interest as the mortgagor acquires.*" (*Italics ours.*)

In General Electric Co. vs. Transit Equipment Co., (N. J.) 42 Atl. 104, the Court, Pitney V. C., said:

"And the first question is whether this is after acquired property, and if not, second, whether it can be held under the mortgage, by reason of its having become a fixture, and so by conversion a part of the freehold. Now, as to the first claim, it seems to me too plain for argument. The mere statement of the case shows that the mortgage cannot prevail, for, in point of fact, this property never was '*acquired*' by the Traction Company, the mortgagor. When furnished, it was a chattel, and for the purpose of the present argument, we must treat it as still a chattel, and, if the title never vested in the Traction Company, then the property never was acquired by the Traction Company, and never became subject to the mortgage. In other words, the acquisition of the title to it by the mortgagor was a condition precedent to its becoming subject to the mortgage."

BANK AND HENLEY, TRUSTEE, ARE CHARGED WITH NOTICE OF HOLT CONTRACT.

Bird was president of the Knitting Mill Company, and also a director of the Peninsula Bank when the deed of trust to Henley, Trustee, was negotiated and concluded. Phillips was cashier of the Bank when the Holt contract was first considered and signed. The record does not show his resignation though it is testified that he resigned immediately after the meeting of September 25, 1909. While it is testified that Phillips was ignorant of his appointment as director of the Knitting Mill, yet he sufficiently recognizes his official connection as to act on September 25, 1909, at the request of Mr. Bird. We submit that he is charged with notice of such matters pertaining to the mill as should by the exercise of diligence have been ascertained by him. Having undertaken to act as a director, he should have informed himself as to the affairs of the mill, and he should be charged with all knowledge which reasonable diligence would have disclosed, which knowledge should be imputed to the Bank.

Again, Bird acted as director of the Bank in the meetings when this deed of trust was considered, although the testimony is that he was excused from voting when this matter came to a vote. We submit that his appearance at the board in an official capacity was sufficient to impute to the Bank knowledge of this contract. He should not have acted as director in this matter; this action should distinguish this case from that line of cases where the director through whom knowledge is

sought to be imputed to his company is acting adversely and in his own interest.

In *State Bank of Williamson vs. Fish*, 120 N. Y. Supp. 365, it was held that a bank which held a heavy mortgage on property of a corporation, would be held through the common director of the Bank and corporation, to have notice that fixtures of considerable value covered by the mortgage were not paid for and were bought under a conditional contract providing title should remain in the seller until paid for in full.

See also as to imputed knowledge,

First National Bank vs. Erickson, (Neb.) 31 N. W. 387.

Bank of Spring City vs. Rhea County, (Tenn.) 59 S. W. 472.

We respectfully submit, for the reasons and upon the authorities above, that neither Henley, Trustee, nor the Peninsula Bank have any claim to the Sprinkler System installed by appellant.

We will now consider the claim of the trustees in bankruptcy.

CLAIM OF TRUSTEES IN BANKRUPTCY.

If the Sprinkler System should be held to be personal property and not subject to the deed of trust to Henley, Trustee, the claim is made that it would pass to the trustees in bankruptcy under the amendment of June 25, 1910, to section 47-a, sub-section 2 of the Act of Bankruptcy, which now provides that

"Trustees shall respectively * * * * *

(2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the Court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; *and such trustees, as to all property in the custody or coming into the custody of the Bankruptcy Court, shall be deemed vested with the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, and also as to all property not in the custody of the Bankruptcy Court shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied.*"

The pertinent portion of this amendment has been italicised.

The District Court and Circuit Court of Appeals held that, in the light of the amendment, it was necessary for Holt to record, or docket, his contract to protect this property from the claim of the Trustees in Bankruptcy.

The District Court conceded that before the amendment the liens upon, or claims to property in the hands of the bankrupt's trustees were unaffected by the bankruptcy.

This proposition is amply supported by *York Manufacturing Co. vs. Cassell*, 201 U. S. 344; *Thompson vs. Fairbanks*, 196 U. S. 516, 526; *Hewitt vs. Berlin Machine Works*, 194 U. S. 296; *Hansell vs. Harrison*, 105 U. S. 401; and other cases cited in these opinions.

CREDITORS UNDER VIRGINIA ACT MEAN LIEN CREDITORS.

It was also conceded by the District Court that the creditors referred to in the Virginia Statute are lien creditors, and not general creditors, or persons holding unsecured claims. *McCandlish vs. Keen*, 13 Gratt. (Va.) 615, 638; *Dulaney vs. Willis*, 95 Va. 606; *York Manufacturing Co. vs. Cassell*, 201 U. S. 344, 351; *Jones on Chattel Mortgages*, 4th Ed., Sec. 245.

STATE ALONE CAN PRESCRIBE TENURES ON WHICH PROPERTY SHALL BE HELD AND PRESCRIBE MODE OF TRANSFER.

This proposition and the authorities to sustain it have been presented in this brief in connection with the bank's claim.

Reference is respectfully made to the authorities there relied upon.

In *Hervey vs. Locomotive Works*, 93 U. S. 660, the Court said:

"It was decided by this Court in *Green vs. Van Buskirk*, 72 U. S. 599, 5 Wall. 307, 74 U. S. 139, that the liability of property to be sold under legal process, issuing from the Courts of the State where it is situated, must be determined by the law there, rather than that of the jurisdiction where the owner lives. These decisions rest on the ground that every State has the right to regulate the transfer of property within its limits, and that whoever sends property to it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides."

In the light of the authorities presented, we believe that it will not be denied that the States alone possess the power to prescribe what may be held as property and the tenures by which it may be so held, and that whatever the State validly determines to be property, it is the duty of the Federal Government to recognize as property.

This is shown further by the ruling of the Supreme Court in *York Manufacturing Co. vs. Cassell*, 201 U. S. 344.

The State law recognized the property in question in this case to be the property of the vendor under his unrecorded contract, and since there was, at the time of the adjudication in bankruptcy, no one who had priority or title under the registry act of Ohio, the property was declared to be the property of the conditional sale vendor.

The law of Virginia is similar in many respects, to the law of Ohio. Under the Virginia law, prior to the amendment of June 25, 1910, there can be no question that the property would have been held to be the property of Holt unless his claim was defeated by the Bank's claim above discussed; and Holt's rights and the validity of his contract must be determined by the local law.

See *Stewart vs. Platt*, 101 U. S. 731.

Bryant vs. Swofford, 214 U. S. 279.

Hansel vs. Harrison, 105 U. S. 401.

See also *Davis vs. Crompton*, 158 Fed. 735, where it is held:

"The interest of the trustee in bankruptcy of a vendee under a conditional contract for the sale of chattels depends upon the law of the State in which delivery of possession under the contract was made."

APPELLANT HAS A VALID CLAIM UNDER VIRGINIA LAW.

Prior to the enactment of section 2462, the claim of Holt would have been maintained without question.

In *McCombs vs. Donald's Administrator*, 82 Va. 903, the principal question in the case was whether an unrecorded contract of conditional sale of personal property was valid as against purchasers from the vendee without notice.

The Court said:

"Now, that the contract between Donald and the firm of McCoy and Saunders was a conditional sale seems to us to admit of no doubt. And in such cases, the Courts have very generally held in accordance with the common law principle, which construes contracts, not in contravention of the law, according to the intention of the parties, that the payment of the purchase money is a condition precedent on the part of the buyer to the vesting of the title, and that the property in the goods agreed to be sold does not pass to the buyer until that condition has been fulfilled.

• • • • •

"By the terms of these contracts, and the intention of the parties thereto, nothing passes to the vendee but the bare possession before the sale has been consummated by the performance of the condition. Until that time, the property remains in the vendor. Unless, therefore, the vendee can convey what does not belong to him, it is impossible that he can convey the title to his sub-vendee; and this accords with the common law, that a man who has no authority to sell, cannot, by making a sale transfer the property to another."

Section 2462, heretofore quoted, was subsequently adopted.

Since its adoption the Supreme Court of Appeals of Virginia in *Monarch Laundry Co. vs. Westbrook*, 109 Va. 382, has distinctly stated that previous to this statute the law of the State was that where a vendor agreed to sell personal property for a price to be paid at a future time, and delivered the possession but expressly retained title to the property until payment, such an agreement constituted a conditional sale; and though by parol or by an unrecorded instrument such reservation was valid as against vendees, creditors and subsequent purchasers, with or without notice.

As to whom has the law as stated in *McComb vs. Donald's Administrator*, 82 Va. 903, been changed by this statute? As to lien creditors and purchasers for value without notice.

TRUSTEES IN BANKRUPTCY ARE NOT CREDITORS OR PURCHASERS UNDER THE VIRGINIA STATUTE.

The trustees in bankruptcy are not creditors.

In *Donald's Administrator, vs. Snead*, 74 Va. (33 Gratt.) 705, the question arose whether a person appointed by a Court of equity in a pending cause, a receiver to collect the purchase money of lands sold by him as commissioner under a previous decree in the cause, and for which he had taken a bond with surety to himself as commissioner was a creditor in the sense of the statute, Code of 1873, Ch. 143, sections 4,5 to whom a surety on the bond may give the notice to bring suit upon it under penalty of forfeiture.

The Court said:

"What then is meant by the word 'creditor' both in legal proceedings and in popular acceptance? He is the person to whom the debt is owed; who has the absolute control of it. He may, if he pleases, release one or all of the parties; and if by his failure or refusal to do an act required by law, a forfeiture ensues, it is his loss and his only. As no one else can release the debt, so no one else can, without his consent, involve him in a forfeiture."

The Court then discusses the applicability of the term "creditor" to one who is a commissioner or receiver in a judicial proceeding, with authority to collect money; the property and money in his hands, as in the case at bar, are in the possession and under the control of the Court; such an official is but an officer of the Court possessing no powers except those conferred upon him by the order of his appointment, and the course and practise of the Court, and such officer has no personal interest but that arising out of his responsibility for the correct and faithful discharge of his duties (2 Davis C. Pleas, 1710-16, 1143; Goss vs. Southall, 64 Va. (23 Gratt.) 825. The Court said:

"The fact is the entire authority of the receiver is limited to the single duty of collecting and paying over the money, and all who deal with him must be held to understand the precise nature and extent of his powers. To speak of such a person as a creditor involves a confusion of terms."

In the case of Rea. vs. Jaffray & Company, 48 N. W. 78, (Iowa), the Court said:

"Appellant contends that appellee is not a creditor of the estate; that there is no debt due or to become due to her; that each item of her claim

is for a mere contingent liability; that the relation of debtor and creditor does not exist; and that she is not, therefore, entitled to have her claim allowed under the Statute. The assignment is for the benefit of creditors, and the distribution of the estate to the creditors. 'A creditor is he who has a right to require fulfillment of an obligation or contract.' "

Bouvier. "One who gives credit in business matters." (Webster).

To the same effect see, *Deseret Nat. Bank vs. Kidman*, 71 Pac. 873.

Guarantee Trust Company vs. Galveston, 107 Fed. 316.

Nicolin vs. Weiland, 56 N. W. 587.

Howard vs. Smith, 38 S. W. 15.

The status of the old creditor is not transferred to the trustee, for the old creditor remains a creditor still after the discharge in bankruptcy. This is clearly shown by the case of *Champion vs. Buckingham*, 42 N. E. (Mass.) 498.

In this case the question arose as to a policy assigned to McFarland as collateral security for the amount of his demands subsisting against Reuben Champion at his decease as creditor or as surety: McFarland had subsisting demands as creditor, against Champion when the latter took the benefit of the bankrupt act. The Court said:

"We think that the discharge did not extinguish the debt or demands. It released the debtor from the legal obligation which he was under to pay the notes and took away from the creditor the right to enforce the payment of them. But

the debt was not paid or satisfied. That still remained as a several obligation on the part of the debtor and was sufficient to sustain a new promise if he had seen fit to make one, waiving the statute bar (citing numerous authorities). The effect of a discharge in bankruptcy is analogous to that of the bar of the statute of limitations, as of infancy, except in the case of necessities; though it is said that a party is not to be deprived of his right to rely on his discharge, unless he has used words that plainly mean to renounce it. (Citing authorities). The running of the statute of limitations puts an end to the remedy to which it applies, not to the debt."

To the same effect that the old debt is a sufficient consideration for a new promise to pay the old debt barred by bankruptcy, see *Homer vs. Speed*, (Va.) 2 Pat. & H. 623, in which it was said that the action might be on the old promise or on the new.

We submit that a Trustee in Bankruptcy is neither a creditor nor a purchaser for value without notice. He cannot be a creditor. He has advanced nothing to the bankrupt and has no pecuniary or other demand in the nature of a credit demand against him. Congress recognizes this to be true in its enactment of the amendment in question for it declares that the Trustee "as to all property in the custody or coming into the custody of the bankrupt Court shall be *deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon.*"

The Trustee is not declared to have these rights, remedies and power; he is only to be *deemed to be vested with them.*

The Trustee is not a purchaser for valuable consideration without notice; *York vs. Cassell*, supra, nor does Congress, if it had the power to do so, now make the Trustee in Bankruptcy a purchaser for valuable consideration without notice. Since, therefore, a Trustee in Bankruptcy is not a creditor nor a purchaser for valuable consideration, he is not included in those two classes as to whom, by the Virginia law, the unrecorded contract is void. The Virginia Legislature alone had the power to prescribe the tenures on which property in the State shall be held, and transferred, and the Virginia law can be amended only by the Virginia Legislature. The construction placed by the lower Courts, however, on the Bankruptcy amendment of June 25, 1910, changes the scope and effect of the act of the Virginia Legislature; in other words, it amends the act of the Virginia Legislature by adding another class of persons as to whom undocketed or unrecorded contracts shall be void. If Congress can thus amend this Virginia act of the Virginia Legislature, may it not amend any other law of the State, and thus violently transgress the sacred limitations expressly imposed by the Constitution?

If the Bankruptcy amendment of 1910, has not thus affected an amendment of the Virginia act, then upon what hypothesis can the decree below be sustained? It is said the adjudication of Bankruptcy operates as a confession of judgment in favor of the Trustee in Bankruptcy, whereby he becomes a lien creditor. But Congress has not said so, if it had that power. It has not provided any means whereby the Trustee may become a

creditor within the operation of the Virginia act. He is only to be deemed to be *vested* with the powers of a lien creditor. To give him the powers here sought Congress undertakes to give a judgment against the Bankrupt, and then to create a person who shall be deemed to be that judgment creditor, when in fact, no such judgment exists. These powers we submit, are wholly beyond the grants found in the Constitution.

UNIFORMITY IN BANKRUPTCY LEGISLATION DESTROYED.

We submit, however, that the amendment of 1910, under discussion, destroys that geographical uniformity required by the Constitution. When A goes into Bankruptcy he is a party to two contracts of conditional sale; one with B on one piece of property, which is recorded, or a memorandum whereof is docketed in accordance with Sec. 2462 of the Virginia Code; another with C, on another piece of property, but C has not complied with the act. There are no creditors in existence as to whom, according to the terms of 2462, Virginia Code, the contract with C is void; therefore, on the day A goes into Bankruptcy, C's contract is just as good, just as valid, and just as binding as B's, but under the construction of this amendment by the learned Courts below, B would be protected and C would not. The same class of persons in the State, would not receive the same consideration under the Bankrupt law, and inequality would follow.

AS CONSTRUED, AMENDMENT TAKES PROPERTY WITHOUT DUE PROCESS OF LAW.

Moreover, in the case stated above, C had property rights equal to B's. The right to decide to what extent the unrecorded or undocketed contract should be void rested exclusively with the Virginia Legislature. That body knew its people and their needs; it knew how far it was advisable to make such unrecorded or undocketed contracts void, and it saw fit to permit validity to continue until two classes should come into being, to-wit: lien creditors and purchasers for value without notice, as to whom the contract *should be void*. Some States make such contracts void absolutely and irrespective of the existence of a lien or not. That is a matter for each State to decide for itself. Virginia has chosen to permit vitality except as against two classes.

Confiscatory Legislation of a civil character is as much opposed to due process of law as judgments of the Legislature imposing penalties for crimes. A Statute which declared in terms and without more that the full and exclusive title to a described piece of land which is now in A shall be and is hereby vested in B, if effectual, would deprive A of his property without due process of law within the meaning of the constitutional provision, for "where rights of property are admitted to exist, the legislature cannot say they shall exist no longer."

See McGhee Due Process of Law, 68.

Forfeiture of rights and property cannot be adjudged by Legislative act, and confiscation without a judicial

hearing after due notice would be void as not being by due process of law. *Boggs vs. Com.*, 76 Va. 989.

A law which divests a right vested under a contract and so impairs the obligation of a contract, is a deprivation of a right of property and therefore inconsistent with the due process clause of the Fourteenth Amendment. *Bradley vs. Lightcap*, 195 U. S. 1, 24.

By the law of Virginia when the Knitting Mill became bankrupt, this sprinkler system was the property of Holt. The contract was valid between Holt and the Knitting Mill Company, and no one existed, as to whom, according to the Virginia laws, this contract was void. The Legislature of Virginia alone had the power to say how far such a contract should be void, and it has spoken. But, according to the decisions in this case, Congress has the power to add another class as to whom this contract shall be void. Such a power, we submit, is an arbitrary exercise of the power of government which is prohibited by our Constitution.

As was said in *Twining vs. New Jersey*, 211 U. S. 100:

"The words due process of law were intended to secure the individual from the arbitrary exercises of the powers of government, unrestrained by the established principles of private right and distributive justice."

As the Supreme Court of the United States said in *Hurlado vs. The People*, 110 U. S. 536:

"But it is not to be supposed that these Legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical

restraint. It is not every act Legislative in form that is law? Law is something more than mere will exerted as an act of power Arbitrary power enforcing its edicts to the injury of the persons and property of its subject is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our Constitutional law upon the action of the governments, both State and National, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority even when acting in the name and wielding the force of government."

Under the law of Virginia, on September 7, 1910, the day of adjudication, the sprinkler system was Holt's, but under this amendment, as construed, Holt's property, on the same day, is lost and that without any act on his part and without the existence of a creditor or purchaser for value as required by the statute. We submit that such a result would violate the Constitutional inhibition that no person shall be deprived of his property without due process of law.

The District Court says that this amendment but carries out what, in the judgment of many, should be the effect of the Bankruptcy proceedings. Is this, however, an argument which should address itself to Congress? If there is a need for remedial Legislation of this character, should it not be addressed to the Legislature of

the State, and until the State is persuaded that its laws work an injustice, should not those laws be allowed to stand? In fact, is there any power to change them?

But why should there be a change? It is said that it is not right that the Bankruptcy law shall prevent A from reducing his claim to judgment and thus subjecting the property in question, while it permits the property which he would thus reach to pass beyond his grasp. If this be deemed an injustice, then many injustices must attend the Bankruptcy law. The same act which stays A's hand stays the conditional vendor's as well. *Non constat*, when A instituted his suit, the conditional vendor would remove his property. One suit may be sufficient to put the vendor on guard and cause him to remove his property or to record his contract. Even if A obtained judgment, still the conditional vendor, with the proper provision in his contract, may pay, and recover his property just so long as the State permits this to be done. It is a right of property which the conditional vendor has of which he should not be deprived by the arbitrary act of Congress.

A., B. and C, three of a dozen or more creditors may proceed in a race of diligence to institute the necessary suits for the reduction of their claims to judgment, but pending their suits, their debtor goes into Bankruptcy. The process of reasoning which asserts an equity to exist in favor of general creditors against property sold under an unrecorded or undocketed contract should entitle these diligent creditors to priority out of the assets over those less diligent.

In the one case, it is said if Bankruptcy had not intervened, a judgment would have reached these particular assets unless the conditional vendor had been sufficiently diligent as to remove them. If this argument is to prevail, then by the same process of reasoning those creditors who had instituted their suits, should be given priority, for it is far more certain that, unrestrained, they would obtain priority than it is that priority would be obtained in a case where no suit has been instituted. The creditor already suing, if he has a just claim, *must* obtain his judgment; but in the meantime, the conditional vendor may remove his property or docket his contract, and probably will do so where his contract contains a clause similar to that in the case at bar which requires the vendee to indemnify and protect the vendor against all claims of creditors and provides that no act or transaction which may affect the title, ownership or interest, of the vendor shall occur without reasonable prior written notice to him, and which contains the further provision that upon such default the whole debt due the vendor should be at once due and payable with right in him to enter upon the premises and remove the property.

We submit, therefore, that the conditional vendor has just as much right to protection as the unsecured creditor, and until this State chooses to declare such contracts void as to all creditors, secured and unsecured, general and lien, as well, it is not in the power of Congress to so declare. As construed by the lower Court, the amendment takes the property of A to pay B's debts, and thus violates the Constitution of the United States in so

far as it provides that no person shall be deprived of his property without due process of law.

By the terms of this contract, as above mentioned, the Knitting Mill Company agreed to protect and indemnify Holt against purchasers without notice, creditors, lien holders and all others, and agreed that no sale, mortgage or other disposition or incumbrance of the buildings, plant, or premises, nor any act or transaction that might affect the title, ownership or interest of Holt in or to said property should occur or be negotiated without reasonable prior written notice from the Knitting Mill Company to Holt, and it was elsewhere provided that in the event of the failure of the Knitting Mill Company to pay the installments as provided, or to carry out or fulfil any other of the conditions of the agreement, said Holt should have the right, in addition to any and all other rights belonging or accruing to said Holt, in any such event, to take out and remove said equipment and to declare the full amount of unpaid installments due and unpaid. This is a contractual right belonging to Holt, the benefit of which is denied to him by the amendment, as construed. Impairment of the obligation of a contract without proper procedure is taking of property without due process of law.

A careful examination of prior English and American Bankruptcy laws shows this amendment, if given the force contended for, to be an absolutely new departure in Bankruptcy law.

Mr. Remington, in section 1144 $\frac{1}{2}$ of his supplement to his work on Bankruptcy, says that this amendment

makes such a radical change in the theory of the trustee's title, and is such a departure in bankruptcy jurisprudence that the mass of decisions, both under the present act and under the former acts are quite thrown out of place as authorities, though they still are to be looked to as stating the rule except in so far as the amendment of 1910 may have changed it.

In the light of the theretofore existing Bankruptcy laws, we submit that it cannot be said that the power granted to establish uniform laws on the subject of Bankruptcies contemplated any such invasion of the rights of private property as would enable Congress by law to legislate A's property away from him and to give it to B, and especially when the determination of property rights is left with the States. It may as well be said that Congress has power to destroy all securities, and all exemptions, or to declare that if A went into bankruptcy every piece of property in his possession by any means or for any purpose should pass to his Trustee in Bankruptcy and thus to his general creditors. These general creditors whose rights are a matter of such tender concern are not superior to any other creditors. In this case they sold their goods and extended their credit in the light of the Virginia Statutes, and they should obtain no advantage which those statutes do not give. These general creditors knew that contracts similar to Holt's were valid until their claim had been reduced to judgment and a lien acquired; they knew when they sold their goods that a conditional vendor was entitled to his reservation, without recording his contract or docketing a memoran-

dum thereof, until they should have become lien creditors. Then how is it that they are later, without attaining the status contemplated by the Virginia act, to secure the benefits obtainable if they do obtain that status? And why is it that A's property shall be taken away from him in any other manner than as contemplated by the Virginia law?

This amendment, moreover, violated the spirit of the Constitution of the United States, and particularly Section X, Paragraph 1, of Article I, of the Constitution of the United States which forbids any State to pass a law impairing the obligations of contracts.

The Holt contract had been executed several months before bankruptcy.

In *Calder vs. Bull*, 3 Dall. 386, 1 L. Ed. 648, Justice Chase said:

"An act of the Legislature (for I cannot call it a law), contrary to the great first principles of the social compact cannot be considered a rightful exercise of Legislative authority. The obligations of a law in governments established on express compact and on Republican principles, must be determined by the nature of the power on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or in other words for an act which, when done, was in violation of no existing law; a law that destroys or impairs, the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from A and gives it to B. It is against

all reason and justice for a people to entrust a Legislature with such powers; and therefore, it cannot be presumed that they have done it. The genius, the nature and the spirit, of our State governments, amount to a prohibition of such acts of Legislation, and the general principles of law and reason forbid them. The Legislature may enjoin, permit, forbid and punish; they may declare new crimes; and establish rules of conduct for all its citizens in future cases; they may command what is right and prohibit what is wrong; but they cannot change innocence into guilt, or punish innocence as a crime, *or violate the right of an antecedent lawful private contract, or the right of private property. To maintain that our Federal, or State Legislature possess such powers, if they had not been expressly restrained, would, in my opinion, be a political heresy, altogether inadmissible in our free Republican Governments.*"

It is true that it has been held that no obligation of a contract can extend to the defeat of legitimate government authority, but we deny that there is any government authority in the Congress of the United States to fix property rights in an effort to establish uniform laws on the subject of bankruptcy. What is the property of the bankrupt is a question determinable by local law. If Congress possesses the power claimed for it here, bailments may be destroyed, liens disregarded, and a friendly loan of chattels for temporary use made the means of increasing dividends to general creditors.

**THIS AMENDMENT SHOULD NOT BE GIVEN A
RETROACTIVE EFFECT.**

Upon the execution of this contract in October, 1909, by the Knitting Mill, Holt's contractual rights to his reservation of title became fixed. Moreover, there existed his right to indemnity, to protection and to notice as above discussed. These rights were all valid and subsisting, but by the amendment of 1910, as construed, they are lost. The amendment, as construed, either violently deprived Holt of these rights on bankruptcy, or it reaches back to the inception of the contract and makes them null and void ab initio.

Either destruction of these rights would give to this amendment a retroactive effect unwarranted by anything contained in the act itself. There is nothing to show any intention on the part of Congress to give the act a retroactive effect, and before it can have such effect, such intent must plainly and clearly appear.

In *Aretic Ice Mach. Co. vs. Armstrong County Trust Co.*, (C. C. A. 3d Cir.) 192 Fed. 114, the Court held that when the rights of the conditional vendor were fixed by the contract of sale prior to the amendment in question, the conditional vendor could reclaim his property.

The Court said:

"The view of the District Court was that the rule applied in *Davis vs. Crompton* is no longer applicable to conditional sales in bankruptcy cases because of the amendment of the Bankruptcy Law by Congress on June 25, 1910, which added to Section 47-a (2) of that law, relating to the duties of trustees in bankruptcy, the following clause:

"And such trustees, as to all property in the custody or coming into the custody of the bankruptcy Courts shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon.

"It is our opinion, however, that the clause should not receive the construction thus given it. The contract of sale before us antedates the amendment. The rights of the vendor and the vendee were fixed by it. Under the law of Pennsylvania the reservation of title in the Arctic Ice Machine Company was good from March 22, 1909, the date of the contract of sale, to June 25, 1910, the date of the amendment, against any trustee in bankruptcy that might have been appointed for Keener Bros. To hold that the amendment divested the vendor of its reserved title is, independent of any constitutional question, to give it a retroactive effect, not consistent with any expressed intent of Congress. The principle is too well established to be disregarded that a statute shall not except where the Legislative intent is clear, be permitted to have a retroactive effect."

One of the latest expressions of the Supreme Court of the United States on this subject is to be found in *Winfree vs. Northern Pacific R'y Co.*, decided February 24, 1913, wherein it was held that a retroactive effect will not be given to the Federal Employer's liability act of April 22, 1908, (35 Stat. at L. 65, Chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322) so as to make its provisions applicable to an alleged cause of action for death which accrued, if at all, before the passage of such statute, since this statute permits a recovery in cases where a recovery could not have been had before, and takes away from the defendant defenses which theretofore were available.

The Court said:

"It is true that it is said that there was liability on the part of the defendant for its negligence before the passage of the act of Congress, and the act has only given a more efficient and more complete remedy. It however, takes away material defenses—*defenses which did something more than resist the remedy; they disproved the right of action.* Such defenses the statute takes away and that none may exist in the present case is immaterial. It is the operation of the statute which determines its character. The Court of Appeals aptly characterized it and we may quote from its opinion; 'It is a statute which permits recovery in cases where recovery could not be had before, and takes away from the defendant defenses which formerly were available,—defenses which, in this instance, existed at the time when the contract of service was entered into and at the time when the accident occurred. Such a statute, under the rule of the cases, should not be construed as retrospective. It introduced a new policy and quite radically changed the existing law.' "

In Davidson Bros. Marble Co. vs. U. S. Ex Rel. Gibson, 213 U. S. 10, 53 L. Ed. 675, where the contract with, and the bond to the Government, and the contract under which the labor and materials were furnished, all antedated the passage of an amendatory statute of February 24, 1905, whereby suit was permitted to be brought in the District where the contract was made when the individual sureties were on the bond, it was held that, as the act of 1894 did not permit suit in such district, it was improperly brought there, as the act of 1905 was not retroactive in effect.

In United States Fidelity & Guaranty Company vs.

U. S. use of S. W. Co., 209 U. S. 306, a case similar to Davidson Bros. Marble Co. vs. U. S. supra, the retroactive effect of the amendatory act of 1905, was considered, and the Court said:

"There are certain principles which have been adhered to with great strictness by the Courts in relation to the construction of statutes, as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied."

Where a statute is susceptible of two constructions by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided, the duty of the Court is to adopt the latter.

U. S. ex rel Att'y Gen. vs. Delaware & H. Co., 213 U. S. 408, 53 L. Ed. 849.

In Southwestern Coal & Improvement Co. vs. McBride, 185 U. S. 499 (503), 46 L. Ed. 1010 (1012), the Supreme Court of the United States adopted as a part of its opinion, the following language of the Court in the same case below (43 C. C. A. 652, 104 Fed. 473):

"The function of the Legislature is to prescribe rules to operate upon the actions and rights of Citizens in the future. While in the absence of a constitutional inhibition, the Legislature may give to some of its acts a retrospective operation, the intention to do so must be clearly expressed, or necessarily implied from what is expressed,

and assuming the Legislature to possess the power, its act will not be construed to impair or destroy a vested right under a valid contract unless it is so framed as to preclude any other interpretation."

In *De Lima vs. Bidwell*, 182 U. S. 1, (199), 45 L. Ed. 1041 (1057), the Court said:

"As the action in this case was brought March 13, 1900, eleven days before the act was passed, the right to recover the money sued for could not be taken away by a subsequent act of Congress. Plaintiffs sue in assumpsit for money which the collector has in his hands, justly and equitably belonging to them. To say that Congress could by a subsequent act deprive them of the right to prosecute this action would be beyond its power. In any event it should not be interpreted so as to make it retroactive. Kennett's petition, 24 N. H. 139; Alter's Appeal, 67 Pa. 341, 5 Am. Rep. 433; Norman vs. Heist, 5 Watts & S. 171, 40 Am. Dec. 493; Donovan vs. Pitcher, 53 Ala. 411, 25 Am. Rep. 634, Palairret's appeal, 67 Pa. 479, 5 Am. Rep. 450; State use of Methodist Episcopal Church vs. Warren, 28 Md. 338."

In *Port of Mobile vs. Watson*, 116 U. S. 289, 29 L. Ed. 620, it was held that when the City of Mobile agreed to levy a special tax for the payment of principal and interest of the class of bonds to which those held by the plaintiff belonged, all laws passed since the making of the contract, whose purpose or effect is to take from the City of Mobile or its successor the power to levy the tax and pay the bonds are invalid and ineffectual and will be disregarded.

In *Chew Heong vs. United States*, 112 U. S. 538, 28 L. Ed. 770 (778), it was held that the Fourth Section of

the act of Congress, approved May 6, 1882, ch. 126, as amended by the act of July 5, 1884, ch. 120, prescribing the certificate which shall be produced by a Chinese laborer as the only evidence permissible to establish his rights of re-entry into the United States, is not applicable to Chinese laborers, who, residing in this country at the date of the treaty of November 17, 1880, departed by sea, before May 6, 1882, and remained out of the United States until after July 5, 1884.

In this case the Court said:

"We have stated the main reasons which, in our opinion, forbid that interpretation of the act of Congress. To these may be added the further one, that the Courts uniformly refuse to give to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the Legislature. In *U. S. vs. Heth*, 3 Cranch 413, this Court said that 'words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the Legislature cannot be otherwise satisfied; and such is the settled doctrine of this Court.'"

In *Auffm'ordt Jr. vs. Rasin*, 102 U. S. 620, 26 L. Ed. 262, the Court said:

"It is to be observed that the full period of four months from the receipt of the securities had passed, indeed, more than six months had passed before the enactment of this amendment, and the bankruptcy proceedings had been initiated within that period, and the assignee appointed. The rights of the parties were therefore fixed before the

new law was passed. The assignee had a vested right to the securities or to their value. The defendants were under legal obligation to return these securities or to pay their value to the assignee. To hold that Congress intended by this amended statute to take away that right of action is to hold that it intended by a retrospective statute to destroy a vested right of property or an existing right of action. If it be conceded that Congress could do this, the principle is too well established to need the citation of authorities, that no law will be construed to act retrospectively unless its language imperatively requires such a construction."

In *Edwards vs. Kearzey*, 96 U. S. 595, 24 L. Ed. 793, it was held that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms, and the Court said:

"This rule embraces alike those which affect its validity, construction, discharge and enforcement."

Again, in the same case, the Court said to the statute of limitations:

"If the period limited be unreasonably short, and designed to defeat the remedy upon pre-existing contracts, which was part of their obligation, we should pronounce the statute void."

Again, in the same case, the Court said:

"No community can have any higher public interests than in the faithful performance of contracts and the honest administration of justice. The inhibition of the Constitution is wholly prospective. The States may legislate as to contracts thereafter made, as they may see fit. It is only

those in existence when the hostile law is passed that are protected from its effect."

In *U. S. ex rel Hoffman vs. Quincy*, 4 Wall. 535, 18 L. Ed. 403 (408), the Court said:

"It is also settled that the laws which subsist at the time and place of the making of a contract and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement.

"Illustrations of this proposition are found in the obligation of the debtor to pay interest after the maturity of the debt, where the contract is silent; in the liability of the drawer of a protested bill to pay exchange and damages, and in the right of the drawer and endorsers to require proof of demand and notice. These are as much incidents and conditions of the contract as if they rested upon the basis of a distinct agreement."

In *Pacific M. S. & S. Co. vs. Joliffe*, 2 Wall. 450 (457), 17 L. Ed. 805, (807), the Court said:

"When a right has arisen upon a contract, or a transaction in the nature of a contract, authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute.

"Words in a statute ought not to have a retrospective operation, unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied. *This rule ought especially to be adhered to when such a construction will alter the pre-existing situation*

of parties or will affect or interfere with their antecedent rights, services and remuneration, which is so obviously improper that nothing ought to uphold and vindicate the interpretation, but the unequivocal and inflexible import of the terms, and the manifest intention of the Legislature. Patterson J. in United States vs. Heth, 3 Cranch 399, 413, 2 L. Ed. 479 (483)."

In this case it was held that the collector of the District of Petersburg was not, by the act of May 10, 1800, restricted to a commission of two and a half per cent. on the moneys by him collected and received after the 30th of June, 1800, on account of bonds previously taken for duties arising on goods imported into the United States.

In *Calder vs. Bull*, 3 Dall 386, 1 L. Ed. 648, Chief Justice Chase said:

"Every law, that takes away, or impairs rights vested, agreeably to existing laws, is retrospective and is generally unjust and may be oppressive; and it is a good general rule, that a law should have no retrospect."

It has been frequently held that all general terms in statutes should be limited in their application so as not to lead to injustice, oppression or any unconstitutional operation, if that be possible. It will be presumed that exceptions were intended which would avoid results of that nature.

Church of Holy Trinity vs. U. S. 143 U. S. 457, 36 L. Ed. 226.

Carlisle vs. United States, 16 Wall. 147, 21 L. Ed. 426.

United States vs. Kirby, 7 Wall. 482, 19 L. Ed. 278.

Supporting the above propositions are further U. S.

and American Sugar Ref. Co., 202 U. S. 564, 50 L. Ed. 1149.

U. S. vs. Burr, 159 U. S. 78, 40 L. Ed. 82.

Twenty per cent. Cases, 20 Wall. 179 22 L. Ed. 341.

Chief Justice Kent says: "The very essence of a new law is a rule for future cases. Dash vs. Van Kleeck, 7 Johns. 447, 5 Am. Dec. 308, and it is well said that there is neither policy nor safety in such laws * * * *. They accord neither with sound Legislation nor the fundamental principles of the social compact. Patterson, in Calder vs. Bull, 3 Dall. 386, 397."

See also in this connection Rhodes vs. Sperry & Hutchinson Company, 193 N. Y. 223, 85 N. E. 1097, where the New York Court of Appeals considered a Statute giving a right of action for the unauthorized use of a person's picture for advertising purposes or for purposes of trade, without the written consent of the person. The act was to take effect September 1, 1903. The Court held that the statute did not apply to pictures acquired before Sept. 1, 1903. The Court said:

"The act is therefore subject to the general rule, that unless a contrary intention clearly appears a law operates only in the future upon future transactions."

This case was approved by the Supreme Court of the United States. See Sperry & Hutchinson vs. Rhodes, 220 U. S. 502, 55 L. Ed. 56.

In Richmond vs. Supervisors, 83 Va. 204 (212), the Supreme Court of Appeals of Virginia said:

"A statute is never construed to be retroactive, except the intent that it shall so operate plain-

ly appears upon its face. Sedg. St. Const. Law 161, note a. Every statute which takes away or impairs a vested right acquired under existing laws or creating a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be deemed retrospective in its operations and opposed to those principles of jurisprudence which have been universally recognized as sound. Broom Leg. Max. 68."

Campbell & Co. vs. Nonpareil, 75 Va. 291.

Peter's vs. Auditor, 74 Va. (33 Gratt.) 368.

Pierce's ex'or vs. Harman's ex'or, 72 Va. (31 Gratt.) 114.

In Duvall vs. Malone, 55 Va. (14 Gratt.) 24, the Court held that the proviso in the act of February 28, 1828, Sup. Rev. Code 272, Section 1, limiting actions on indemnifying bonds to seven years does not apply to an action on a bond executed prior to the passage of the act. The Court said:

"It may be conceded for the purposes of this case, that a statute of limitations is to be regarded as affecting the remedy; and that the Legislature has authority to vary the remedy by enlarging or restricting the time within which it may be pursued. Obvious considerations of justice require that in the exercise of their power a reasonable remedy should be saved to any party having a right. It would be harsh legislation to deprive him of his right under color of modifying and limiting his remedy, either by reserving to him no remedy at all or one that is merely illusory and likely to be of no value. In the case before us, however, I deem it unnecessary, and therefore improper to express any opinion on the question whether the sufficiency of the remedy is to be decided by legislative discretion or by judicial determination. In

our case, the well settled principles of this Court require that we shall construe the statute before us as operating prospectively only, although the Legislature may have authority to make a law to operate retroactively, yet it must clearly appear that such was the intention.

In the case of *Stewart vs. Vandervort*, (W. Va) 12 L. R. A. 50, it was said that one of the cardinal rules by which Courts are governed in interpreting statutes is that they must be construed as prospective in every instance, except where the intent that they shall act retrospectively is expressed in clear and unambiguous terms, or such intent is necessarily implied from the language of the act, which would be inoperative otherwise than retrospectively. It is not enough that the language is general enough to cover past transactions to justify a retroactive construction. Every reasonable doubt is resolved against a retroactive operation of the statute. *Wade Retroactive laws* 34, 35.

The attention of the Court is also respectfully directed to the note to the above case in 12 L. R. A. 50, and the full collection of cases there cited.

In *Varick vs. Boggs*, 6 Paige at p. 332, the Court said:

“Even if section 4 of the act of 1813 was intended to reach such a case, I have no hesitation in saying that a retroactive statute, the immediate and necessary effect of which must be to destroy or materially impair a vested right under a previous contract or conveyance is inoperative and void. In construing statutes, however, it is not reasonable to presume that the Legislature intends to violate a settled principle of natural justice or

to destroy a vested title to property. . Courts therefore, in constructing a statute, will always endeavor to give such interpretation to the language used as to make it consistent with reason and justice."

Lewis Sutherland on Statutory Constr. Sec. 580.

Under the laws of Virginia, the rights of Holt were fixed when the contract was entered into. His reservation of title was good to the 25th day of June, 1910, the date of the amendment against any trustee in bankruptcy that might have been appointed, and under the principles followed in Arctic Ice Co. vs. Armstrong, *supra*, and the many cases above cited, Holt's claim should have been sustained.

Another important consideration in this connection is that prior to June 25, 1910, this corporation could not have become a voluntary bankrupt.

It would serve no useful purpose to multiply authorities illustrating the principle above contended for.

NO TIME GIVEN TO COMPLY WITH THE ACT.

Before the adoption of this amendment, the contract between Holt and the Knitting Mill was good, and certain rights existed under it. Holt had no occasion to fear bankruptcy of the Knitting Mill Company for two reasons; first, under the then existing law the Company could not go into bankruptcy; second, if it should be thrown into bankruptcy, Holt's rights would be good. If Congress had the power to enact a law destroying these rights, then it should have given a reasonable time within which steps might be taken to preserve the rights

threatened by such Legislation. It is true that the proper Legislative body may enact statutes of limitations or laws requiring the recordation of certain papers, and these recordation laws may apply to papers theretofore executed, but in such case a reasonable time must be given within which to avoid the prohibition of the statute. In the first case a reasonable time must be given within which to bring suit and obtain judgment and in the second a reasonable time within which to record the instrument.

“The right of the State to prescribe the time within which existing rights shall be prosecuted, and the means by and conditions on which they may be continued in force, is we think, undoubted; otherwise where no term of prescription exists at the inception of the contract, it would continue in perpetuity and all laws fixing a limitation upon it would be abortive. Now it is elementary that the State may establish, alter, lengthen or shorten the period of prescription of existing rights, *provided that a reasonable time be given in future for complying with the statute.* (Italics ours).

Vance vs. Vance, 108 U. S. 514.

In the above case a day was fixed in the future, reasonably distant, within which the mortgage might be recorded.

In Turner vs. State of New York, 168 U. S. 91, 42 L. Ed. 322, it was held that a limitation of six months after the passage of a statute within which action for lands sold for taxes may be brought is not repugnant to the Constitution of the United States. The Court said:

“It is well settled that a statute shortening the period of limitation is within the constitutional

power of the Legislature provided a reasonable time, taking into consideration the nature of the case, is allowed for bringing an action after the passage of the statute and before the bar takes effect."

In *Wheeler vs. Jackson*, 137 U. S. 245 (255), 34 L. Ed. 659 (663), the Court said:

"It is the settled doctrine of this Court that the Legislature may prescribe a limitation for the bringing of suits where none previously existed, as well as shorten the time within which suits to enforce existing causes of action may be commenced, *provided in each case, a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of suit before the bar takes effect.*

In *McGahey vs. State of Virginia*, 135 U. S. 662 (705), 34 L. Ed. 317, the Court said:

"The passage of a new statute of limitations giving a shorter time for the bringing of actions than existed before, even as applied to actions which had accrued, does not necessarily affect the remedy to such an extent as to impair the obligation of the contract within the meaning of the constitution provided a reasonable time is given for the bringing of such actions. This subject has been considered in a number of cases by this Court, particularly in *Terry vs. Anderson*, 95 U. S. 628 (632), 24 L. Ed. 365 (366), and *Kosh Konong vs. Burton*, 104 U. S. 668 (675), 26 L. Ed. 886, 889, where the prior cases are referred to. In *Terry vs. Anderson*, Chief Justice Waite speaking for the Court said: 'This Court has often decided that statutes of limitations affecting existing rights are not unconstitutional, *if a reasonable time is given for the commencement of an action before the bar takes effect.* *Hawkins vs. Barney*, 30 U. S., 5 Pet.

457, 8 L. Ed. 190; Jackson vs. Lampshire, 28 U. S., 3 Pet. 280, 7 L. Ed. 679; Sohn vs. Waterson, 84 U. S., 17 Wall 596, 21 L. Ed. 737; Christmas vs. Russell, 72 U. S., 5 Wall 290, 18 L. Ed. 475; Sturges vs. Crowninshield, 17 U. S., 4 Wheat. 122, 4 L. Ed. 529."

In *Parmenter vs. State*, 135 N. Y. 153, it was held that a statute limiting the time in which to bring an action upon contract must leave a reasonable time in which a party may, after the passage of the act, commence his action and a statute cutting down the right to commence an action upon a cause of action then existing from a period without limitations to a few months after the passage of the act does not give such reasonable time and is unconstitutional.

In this case the Court reviewed many decisions and at page 170 said:

"If the curtailment of the right to file a claim is to be regarded as the same in effect as the shortening of a statute of limitations, I think there can be no doubt that in such a case as this an act which leaves a period of less than eight weeks after its passage in which to commence an action which right was before unlimited as to time would not leave a reasonable time in which to learn of the passage of the statute, elect what course to pursue, and having made the election to carry out the same."

In this case the Court also discussed the extent to and time at, which knowledge of a changed law was imputed to a party and the Court said:

"It is to be noted that in the case of the alteration of a statute as to limitations a claimant must be held to have known not only the law existing at

the time of the creation of the liability, but he must be held to have become acquainted with the fact of the passage of the statute which alters that law to his cost. Within what time shall such knowledge be imputed to him and how long a time thereafter would constitute a reasonable time for him to act in? Immediate knowledge, perhaps, ought not to be imputed to him upon such a question. Although knowledge of the law is frequently and for the purposes of justice to be imputed to an individual, yet where the case is one in which to decide what is a reasonable time to leave for the commencement of an action upon a cause thereof already accrued, but under the law as altered, the question as to when knowledge of the passage of the act effecting the alteration should be imputed to the citizen is one of the factors in deciding the general question. This question of reasonable time cannot of course form the subject of an inquiry in the case of each individual to be affected by the alteration of the law. It must be decided by the Court as a question of law, and upon a general consideration of all facts in regard to which Courts will take judicial notice."

What time was left under the Act of June 25, 1910, within which Holt might docket his contract? Not a minute of a day. Instantly, his rights were cut off. The law was an absolutely radical departure in Bankruptcy law, and yet no provision was made for protection against its penalties.

Under the principle announced in the cases above, in support of which many others might be cited, we submit that the law was ineffective so far as existing rights were concerned.

UNDER THE BANKRUPTCY LAW AMENDED, THE RIGHTS OF HOLT MUST BE PROTECTED.

By Section 70 of the Bankruptcy act it is provided that the trustee of the estate of a bankrupt, upon his appointment and qualification, * * * * * shall in turn be vested by operation of law with the title of the Bankrupt, as of the date he was adjudged a bankrupt, to all (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, etc.

Under this section, the Supreme Court of the United States decided the case of *York vs. Cassell*, 201 U. S. 344; *Hewitt vs. Berlin Machine Works*, 194 U. S. 296; *Holt, Trustee, vs. Crucible Steel Company*, 224 U. S. 262, 56 L. Ed. 756, and that line of cases which hold that unrecorded chattel mortgagee and unrecorded or undocketed conditional sale contracts are good, when the State statute does not make such instruments *void as to general creditors for want of registration or docketing*.

Under the same section, the Supreme Court of the United States upheld the claim of the Trustee in Bankruptcy to such property where the law or the State made such instruments void as to general creditors if not properly docketed or recorded. See *Security Warehouseing Company vs. Hand*, 206 U. S. 415, 51 L. Ed. 1117, 27 Sup. Ct. Rep. 720, and *Knapp vs. Milwaukee Trust Company*, 216 U. S. 545, 30 Sup. Ct. Rep. 412.

Congress undoubtedly knew the construction which had been placed on Section 70-a. That section defines the title which the Trustee shall have to property, while amended Section 47-a (2) pertains to the duties of Trustees. Conceded, that the Trustee is vested with the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings, yet the rights, remedies and powers thus vested must apply to property, the title to which is given him by unamended Section 70. Though the Senate Judiciary Committee Report may have attributed the amendment to a desire to destroy the effect of the ruling of the Supreme Court in *York vs. Cassell*, 201 U. S. 344, yet this purpose failed for Congress omitted to amend the very section on which the Supreme Court had placed its ruling.

The District Court conceded that the amendment should have been made to Section 70 but held that Congress could have expressed its desire and wish as well under the section prescribing the duties of the Trustee as under the section relating to the title to property. We submit, however, that these sections must be read together and the failure of Congress to amend the section relating to the title which the Trustee shall take, shows that whatever else may be the meaning of Section 47-a (2), Congress intended the Trustee to take only that title to property which the bankrupt himself had. The amendment to Section 47-a (2) must then refer to the Trustee's duties as to property the title to which vested in him under Section 70, and since the title to this sprinkler system

could not vest in the Trustees under Section 70, Section 47-a (2) cannot apply to this sprinkler system.

Moreover, Section 64 of the Bankrupt act remains unamended. This section regulates the order of distribution of the assets, and speaking generally, the distribution there provided for is, (a), Taxes, (b), Debts, as follows: (1), Costs of preserving estate; (2), filing fee in involuntary cases, etc.; (3), Costs of Administration; (4), Wages due workmen, and “(5), Debts owing to any person who by the laws of the States or the United States is entitled to priority.”

This section has not been amended, and it requires that priorities under the State law be recognized. We have shown that Holt had a lien under the State law, except against lien creditors and purchasers for value, none of whom existed. Therefore, Holt had priority, which under unamended Section 64 should be protected.

This was the ruling in *Re. Lausman*, 183 Fed. 648, in which the claim of the conditional vendor holding an unrecorded contract with a reservation title was protected. The Court held that no lien having been acquired on the subject of the conditional sale contract, the Trustee did not take title thereto. The Court said:

“Precisely what the portion of this amendment which we have italicised may mean, and how it should be applied in any given case, are matters which may give the Courts more or less trouble; but one thing seems to be clear, namely, that it does not attempt to repeal nor alter section 64, of the Bankruptcy act, which regulates the order of distribution of assets, nor does it change clause 5

of that section which provides that 'debts owing to any person who, by the laws of the States or the United States is entitled to priority shall be given priority in the distribution of the bankrupt's estate next after those claims which are given priority by previous clauses of the section.' "

Again, the Court said:

"We think that Section 47, as amended, and Section 64 do not conflict either in language or in Legislative intention. Under these circumstances, no lien upon the Computing Scales having been otherwise acquired, so far as the record before us discloses, and under what we regard as the express mandate of the Circuit Court of Appeals, we must reverse the order of the referee, and direct that he ascertain what the Computing Scale brought, if the same has been sold, and give the Scale Company priority of payment out of the proceeds. But, if the Computing Scale has not been sold, then to direct its sale in due course, giving the Scale Company priority out of the price obtained, or if advisable, the Trustee might surrender the Computing Scale to the Scale Company, especially if the latter will agree to take it in full settlement of its demand. The Referee, however, should be at liberty to ascertain whether, before the adjudication, any other creditor had obtained a lien upon the Scales and if so, to determine the right as between any such creditor and the Scale Company. We do not deem it necessary to discuss the question of the constitutionality of the amendment of June 25, 1910, as applied to this case nor whether that amendment can be given a retroactive operation."

THE AMENDMENT REFERS ONLY TO THE PROPERTY OF THE BANKRUPT.

The word property is used three times in the amendment 47-a (2), and twice the word manifestly refers to the property of the bankrupt, and not to the property of any other person. This use may be looked to in determining the use of the word "property" in the particular sentence with which we are concerned. There is a *prima facie* presumption that the meaning of a word repeatedly used in a statute is identical in all places, unless there is something to show that another meaning is intended. See 26 Am. and Eng. Enc. L. 610.

To the same effect is *Postal Telegraph Company vs. Farmville*, 96 Va. 664. In this last case, the Court said:

"Here, then, we have in this section the word 'along' appearing three times; and the sense in which it is used in the first and third instances is clear, and unquestioned. The same meaning, therefore, will be attributed to it elsewhere, unless, there be something in the context which clearly indicates that the Legislature intended some other and different meaning to attach to it."

In *Pelte vs. Shipley*, 46 Cal. 160, the Court said:

"It is a familiar principle of construction that a word repeatedly used in a statute will be presumed to bear the same meaning throughout the statute, unless there is something to show that there is another meaning intended."

In *Rhodes vs. Weldy*, Ohio, 15 Am. St. Rep. 591, it was held that when the same word or phrase is used more than once in the same act, especially in the same section,

and in the same sentence, in reference to the same subject matter, and looking to the same general purpose, it is a fundamental rule of statutory construction that if in one construction the meaning is clear, and in the other it is otherwise doubtful or obscure, it is in the latter case to be construed the same as in the former.

In 47-a (2), "property" in the sentence "collect and reduce to money the property of the estate for which they are Trustees" can mean one thing only, that is, the property of the Bankrupt. Again, in the sentence "and also as to all property not in the custody of the Bankruptcy Court, shall be deemed, etc.," can mean only the property of the Bankrupt, for otherwise the meaning would extend to the property of all persons whatsoever. By the rule of interpretation above stated, we must then construe the word "property" in the sentence "and such Trustee, as to all property in the custody or coming, etc.," to mean property of the bankrupt.

This sprinkler system is not the property of the Bankrupt and never was under the Virginia laws; therefore, it is not such property as comes within the contemplation of the said amendments.

This construction is consonant with the other provisions of the Bankruptcy Law, and accords with the Virginia law; the right of all parties are protected and no constitutional limitations are exceeded.

For the reasons given and upon the authorities cited

we submit that the decrees of the District Court and Circuit Court of Appeals, should be reversed and the appellant be held entitled to his sprinkler system equipment or payment therefor.

Respectfully submitted,

R. T. ARMISTEAD.

S. O. BLAND,

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SUPREME COURT OF THE UNITED STATES.

No. **229.**

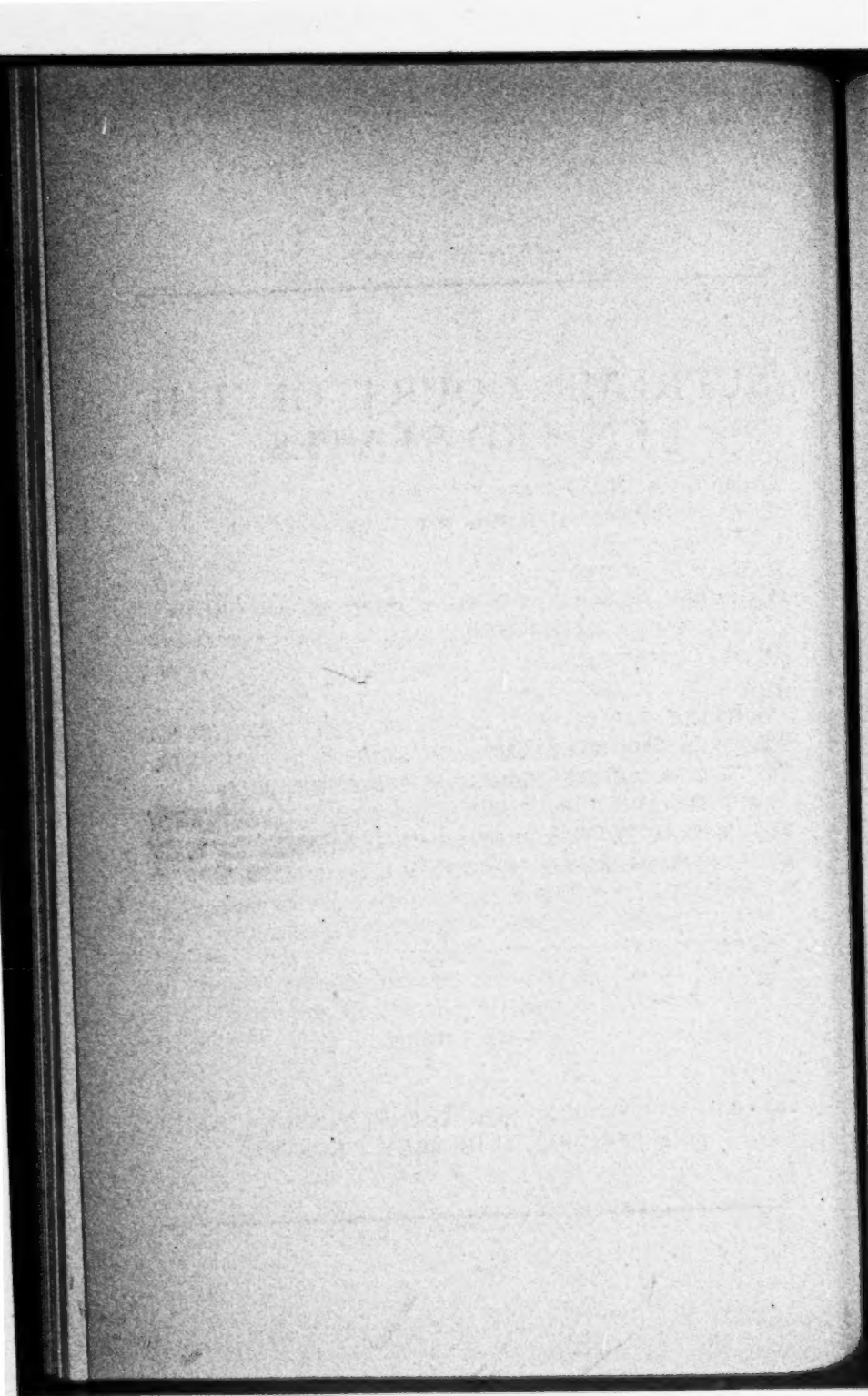
**GEORGE H. HOLT, DOING BUSINESS AS GEORGE
H. HOLT & COMPANY,.....APPELLANT,**

VS.

**NORVELL L. HENLEY, TRUSTEE; THE PENINSULA
BANK OF WILLIAMSBURG, VIRGINIA; THE VIR-
GINIA TRUST COMPANY, TRUSTEE, AND H. N.
PHILLIPS, J. B. C. SPENCER AND WILLOUGHBY
T. COOKE, TRUSTEES IN BANKRUPTCY OF WIL-
LIAMSBURG KNITTING MILL COMPANY, BANK-
RUPT,.....APPELLEE.**

**APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS OF THE UNITED STATES FOR THE
FOURTH CIRCUIT.**

**BRIEF OF COUNSEL FOR THE PENINSULA BANK
AND NORVELL L. HENLEY, TRUSTEE.**



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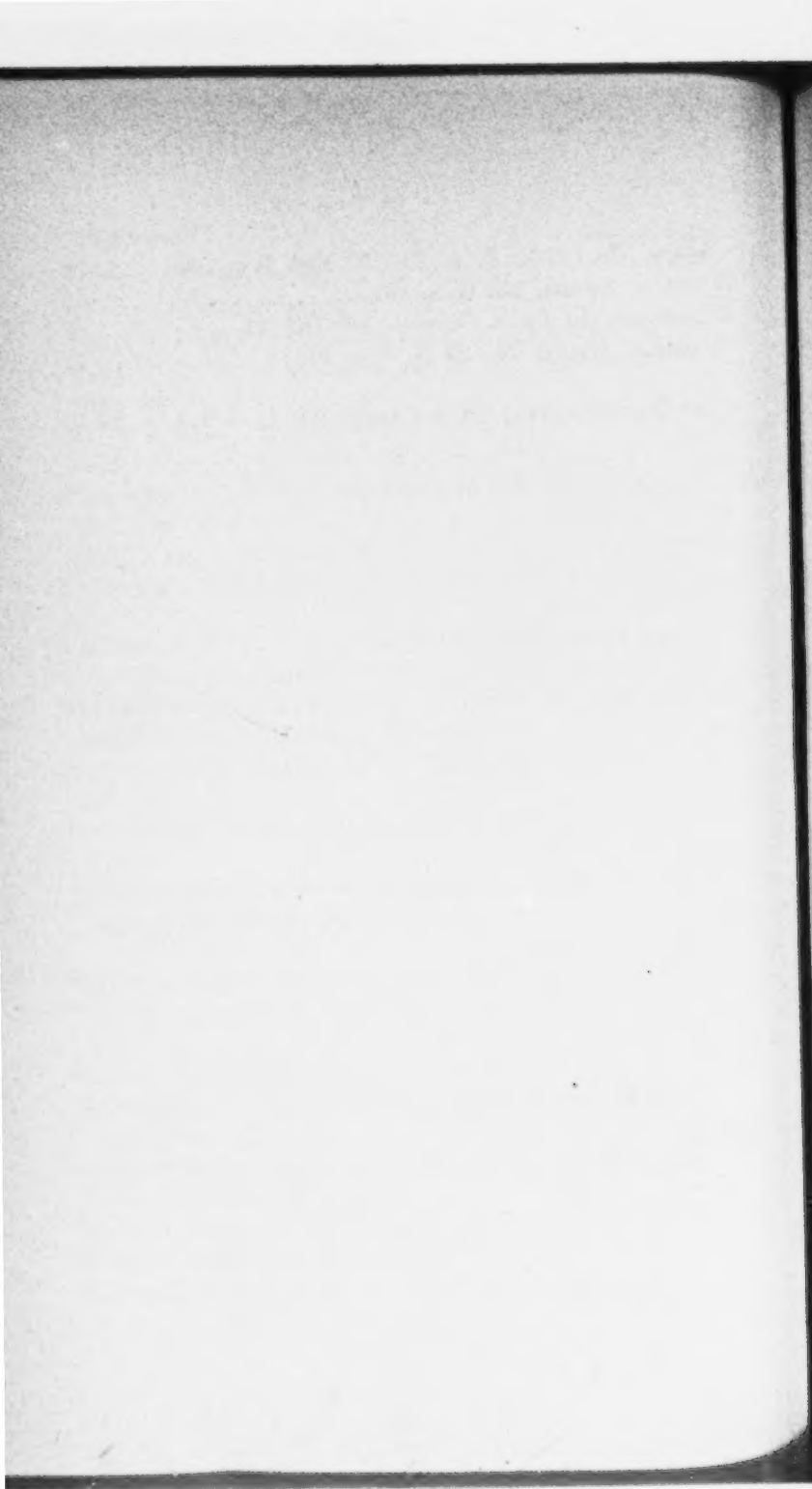
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SUPREME COURT OF THE UNITED STATES.

No. 608.

GEORGE H. HOLT, DOING BUSINESS AS GEORGE
H. HOLT & COMPANY,.....APPELLANT,

VS.

NORVELL L. HENLEY, TRUSTEE; THE PENINSULA
BANK OF WILLIAMSBURG, VIRGINIA; THE VIR-
GINIA TRUST COMPANY, TRUSTEE, AND H. N.
PHILLIPS, J. B. C. SPENCER AND WILLOUGHBY
T. COOKE, TRUSTEES IN BANKRUPTCY OF WIL-
LIAMSBURG KNITTING MILL COMPANY, BANK-
RUPT,.....APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS OF THE UNITED STATES FOR THE
FOURTH CIRCUIT.

BRIEF OF COUNSEL FOR THE PENINSULA BANK
AND NORVELL L. HENLEY, TRUSTEE.

STATEMENT OF CASE.

The Williamsburg Knitting Mill Company, of Williams-
burg, Virginia, a corporation engaged in the manufacture
of cotton goods, was adjudged a bankrupt by the United

States District Court for the Eastern District of Virginia, on the 7th day of September, 1910, on its voluntary petition, and Phillips, Spencer and Cooke were duly elected trustees in bankruptcy on September 19, 1910, and qualified as such. (Record, 108.)

The real estate and plant of the said company were subject to the lien of a deed of trust to the Virginia Trust Company, trustee, dated January 1, 1901, and there was a subsequent deed of trust dated November 23, 1909, to Norvell L. Henley, trustee, conveying the real estate of said company, together with all its engines, boilers, fixtures, machinery and appliances then on said property, or to be afterwards acquired and placed on said premises. (Record, 83.)

On September 26, 1911, the appellant, George H. Holt, trading as George H. Holt & Co., filed his petition in said bankruptcy proceedings, whereby he asserted a claim to a complete automatic sprinkler system and equipment which had been placed upon the premises of the said knitting mill company in the spring of 1910, under contract in writing dated August 25, 1909, alleging that he was entitled (a) to have the equipment removed, (b) or to have its value ascertained and paid to him. The basis of this claim is the said contract in writing between the appellant and the said knitting mill company, dated August 25, 1909, wherein and whereby the appellant reserved, or attempted to reserve, the title and right of possession until the purchase price was wholly paid, which has not been done.

The deed of trust to Henley, trustee, of November 23, 1909, was to secure the payment of \$12,000.00, evidenced by notes payable to and held by The Peninsula Bank of Williamsburg, Virginia, which indebtedness had been reduced to \$10,000.00 at the time the knitting mill company was adjudged a bankrupt.

QUESTIONS INVOLVED.

The three questions involved, so far as The Peninsula Bank, mortgagee, and Norvell L. Henley, trustee, are concerned, are:

1. Whether the sprinkler system equipment is a fixture and passes under the deed of trust to Henley, trustee.

2. If said sprinkler system is not such a fixture, then whether the lien which Holt undertook to reserve under his conditional contract of sale is valid against the claim of said bank.

3. If said sprinkler system is not a fixture, and Holt's lien is invalid, whether the proceeds from the sale of said property should go to the said bank or to the trustees of the bankrupt.

MANNER IN WHICH QUESTIONS WERE RAISED.

The manner in which the questions presented were raised is correctly set forth in appellant's brief, pages 8-9, to which reference is here made.

SPECIFICATIONS OF ERROR.

The appellant relies upon seven grounds of error on the part of the court, the first, second and fourth of which vitally affect the interest of The Peninsula Bank. If, as contended for by us, the sprinkler system is a fixture and has become a part of the real estate, or that its purposes are so essential to the operation of the plant that it cannot be removed therefrom without seriously injuring the plant

or destroying its usefulness, then it is immaterial how the learned judge of the District Court, or the Circuit Court of Appeals, in confirming the ruling of the District Court, arrived at the conclusion that Holt's claim was invalid in so far as the claim of The Peninsula Bank is concerned. As stated in the opinion of the court (record, 111-12)—

"There are only two questions in the case. *Union Trust Co. v. Southern Saw Mills Co.*, 166 Fed. 193, and *Tippett & Wood v. Barham*, 180 Fed. 76, answer one of them; the act of June 25, 1910, amendatory of the bankrupt law, the other. That act was intended to apply to every bankruptcy, the petition in which was filed after its passage. The conditional vendor in this case had not recorded his contract. By the law of Virginia, a lien creditor or a subsequent purchaser without notice was not bound by it. A trustee for creditors under a conventional assignment might ignore it. *Arbuckle Bros. v. Gates*, 95 Va. 802. Congress had the right to make it ineffective as against a trustee in bankruptcy. An act of Congress may to some extent lawfully affect rights which had their inception before its passage.

Wilson v. Nelson, 183 U. S. 191;

Louisville & Nashville R. R. Co. v. Mottley, 219 U. S. 480."

ARGUMENT.

SPRINKLER SYSTEM IS A FIXTURE, AND PASSES UNDER DEED
OF TRUST TO HENLEY, TRUSTEE.

This is a question of fact, and one that has been passed

upon by the referee, acting as master. The referee had the opportunity of personally inspecting the premises; he looked into the faces of the witnesses who testified in this case, and was peculiarly fitted to pass upon the weight of their testimony. It is, therefore, interesting to note his findings with reference to this property, which are as follows:

"The said sprinkler system equipment as installed consisted of a 50,000-gallon tank, erected on a steel tower, which was bolted to a concrete foundation, said concrete foundation having been erected for that purpose by the bankrupt, to which tower was attached by 'T' bolts inserted, and the holes filled with concrete, and pipes run from the tank into the mill, and bolted or screwed to the ceiling beams in the various rooms and workshops; that said tower, tank and foundation are on the outside of the building; that upon said tower there was a smaller tank, used for the purpose of supplying the boilers of the plant and domestic uses of the mill, and the said smaller tank being attached to the bottom and sides of the upper tank. (Record 29.) * * *

"That there was no other tank, except the smaller tank referred to, to supply water for the boilers of said mill and domestic purposes, and that while the said tank could be detached easily from the said tower, in order to supply water for such purposes, it would be necessary to erect another tower, which would have to be of sufficient height to conduct water through the various parts of the said building; that the tower as used was as necessary to support the smaller tank used for domestic purposes as the larger tank used for the sprinkler system, except

that for the smaller tank a less substantial and costly tower would have sufficed." (Record 30.)

The learned judge of the District court as well as of the Circuit Court of Appeals relied upon the two leading cases recently decided—namely, *Union Trust Co. v. Southern Saw Mills Co.*, 166 Fed. 193, and *Tippett & Wood v. Barham*, 180 Fed. 76.

In the *Union Trust Co. case*, the court, on page 199, says:

"(A) The claims set forth in paragraph A relate entirely to machinery and fixtures purchased by and delivered to the company prior to the receivership, for which conditional sales contracts were taken, providing that the title to the property should remain in the sellers thereof until paid for in full. These contracts were not recorded. Under them, the property was taken over by the company, attached to, used in, and regularly became a part of the plant. Payments were made by the company on account thereof, and the sum due thereon was the amount found owing at the time of the receivership, except, as to the claim of Allington & Curtis, a portion of the work was done after the receivership. The conditional sales agreements never having been recorded, these claims cannot be allowed as against the bondholders secured in the mortgage existing upon the property at the time of the delivery of the goods, and, the same having been used in and become part of the plant of the defendant corporation, became subject to the provisions of the after-acquired property clause in the mortgage hereinbefore recited. In discussing these questions in *Evans v. Kister*, 92 Fed. 827, at page 836, 35 C. C. A. 28, at page 37

(Judges Taft and Lurton presiding), it is said:

"* * * * * If the machinery so purchased and set up has become so affixed as to be part of the principal thing, it will pass under the mortgage, notwithstanding an agreement between the mortgagor and furnisher that the title shall remain in the vendor until payment. * * * Mere registration of an agreement between the mortgagor and vendor preserving the personal character of the property affixed to the freehold mortgaged will not prevent the attached property from passing under a previously existing mortgage. To prevent such a result the mortgagee must be a party to the agreement.'"

The case of *Tippett & Wood v. Barham*, 180 Fed. 76, just as the case at bar, decided two questions, (1) whether the property therein described was a part of the realty, or, rather, partook of the realty, and (2) whether it passed under the after-acquired property clause.

In passing upon the first inquiry, the court, on page 79, says:

"As between the parties to the contract doubtless the rights reserved to Tippett & Wood would be binding, but as the question here is between the appellants, on the one side, and the trustee under the mortgage and the bondholders, on the other, it is pertinent to inquire whether there is any reason or principle upon which the interests of these latter parties who were not parties to this contract can be affected by it."

Can the court conceive of anything more necessary to the operation of a plant than its water supply? or anything more substantial than the tank and tower described by the

master? Is there anything to distinguish the property in the case at bar from that described by the master in the case of *Tippett & Wood v. Barham, supra*? Can it be successfully said that a standpipe is any more substantial in its nature than the steel tank and tower? or are any of the various appliances mentioned in the numerous cases cited by counsel for appellant more substantial in their nature or more essential to the operation of the plant than the sprinkler equipment herein described?

There is no evidence to warrant the contention made by counsel for appellant that the tank and tower can be easily removed and no injury will be done to the knitting mill company's plant, and it is simply a fancy based upon theory, and not upon the facts in this case.

The decisions in *Union Trust Co. v. Southern Saw Mills Co., supra*, and *Tippett & Wood v. Barham, supra*, are fully in accord with the decisions of the Virginia courts.

In *Green v. Phillips & als*, 26 Gratt. (67 Va.) 752, on page 762-3, the court said:

"The true rule deduced from all the authorities seems to be this: That where the machinery is permanent in its character, and essential to the purposes for which the building is occupied, it must be regarded as realty, and passes with the building; and that whatever is essential to the purpose for which the building is used will be considered as a *fixture*, although the connection between them is such that it may be severed without physical or lasting injury to either."

In *Morotock Insurance Company v. Rodefer Bros.*, 92 Va. 747, the court, in passing upon the question whether or not the engines, machines, tools, appliances, connections,

attachments, and contrivances of every kind then used in the operation of the glass factory on the premises, were personal property, on page 752 said:

"The record contains no evidence in regard to this property beyond what the mortgage itself discloses; and whether it was personalty, or what the law denominates 'fixtures,' and was, therefore, a part of the realty, and passed with it, depends not less upon its relation to the realty and the use to which it was put than upon its nature.

In this age of marvelous development of industries and multiplication of manufactures it is a matter of common knowledge that it is the machinery and apparatus necessary for the production of the particular manufacture which form the principal part of the manufactory, and that the building in which they are placed and to which they are affixed serves but to enclose and protect them. They mainly constitute the manufactory, while the building is generally only the incident."

The court cites with approval *Green v. Phillips & als*, *supra*, and *Shelton v. Ficklen, Trustee*, 32 Gratt. (73 Va.) 727.

In the case of *The Haskin Wood Vulcanizing Company and Others v. The Cleveland Ship-Building Company*, 94 Va. 439, the rule as laid down in *Green v. Phillips*, *supra*, *Shelton v. Ficklin, Trustee*, *supra*, and *Morotock Insurance Company v. Rodefer Bros.*, *supra*, is fully approved, and the court, in determining whether or not the machinery is personal property or realty, on page 447 said:

"Applying this rule to the case at bar, it is clear

that the machinery furnished by appellee constitutes part of the realty and forms the most important part of the structure in question."

Counsel for appellants rely with a great deal of force upon a decision in *Monarch Laundry Co. v. Westbrook*, 109 Va. 382, but the court will observe that that case is easily distinguished from the case at bar. There the vendor had sold to the laundry company engines and boilers under a contract reserving title thereto, which contract had been duly docketed as required by the statute law of Virginia, so that the only question that the court was called upon to decide was whether or not the property so furnished became a fixture so as to prevent reserving title under the provisions of section 2462 of the Code of Virginia, and while the court did determine that the engine and boilers were personal property, it did so under the theory that they were movable personal property, and on page 386 the court said:

"The definition of the word 'movable' is, 'that which may be lifted, carried, drawn, turned or conveyed, or in any way made to change place or position.'"

While in the case at bar, from the finding of the referee, the property furnished by appellant to the bankrupt was *immovable, permanent in its nature, and essential to the operation of the plant.*

Again, the decision in *Monarch Laundry Co. v. Westbrook* does not overrule the decision in *Morotock Ins. Co. v. Roderfer*, *supra*, nor in *Shelton v. Ficklin, Trustee*, *supra*, but cites these cases with approval. While it may be true, as contended for by counsel for appellant, that as between themselves parties can fix the status of property to the

extent that property otherwise realty will remain personalty, yet there is no authority for the position that such an agreement can bind *third parties*, and the real question is whether or not Henley, trustee, and The Peninsula Bank had notice of the claim alleged to have been reserved by appellant.

If, as so vigorously contended for, the sprinkler system is not a fixture, nor subject to after-acquired property clause, is it not singular that the contracting parties should have gone to the precaution of having the Virginia Trust Company waive its claim? (Record 12-13.) We can only look to the act of the parties to ascertain what their intention was at the time of the execution of the contract, and it is interesting to note the following language used by the parties at the time:

"It is agreed that the said sprinkler system and equipment shall become, be and remain the property of the party of the first part until the title thereto is acquired by the party of the second part as hereinafter provided, and that said system equipment shall, during the period of the agreement herein provided, be, and be considered as, personal property and not a part of the realty." (Record 5.)

Thus it will be seen that at least the appellant and Mr. Bird, president of the knitting mill, thought that this sprinkler system would partake of the realty, or that it would be covered by the after-acquired property clause in the deed of trust to the Virginia Trust Company, or else the provision would not have been made.

It is a well recognized principle of law that in the construction of written instruments the intention of the parties is to be sought and enforced; and in ascertaining this inten-

tion, the position of the parties, the nature of the agreement and subject matter, as well as all the circumstances surrounding the transaction, are material and pertinent facts entitled to great consideration.

Thus, the Supreme Court of Appeals of Virginia, in the case of *Southern R. Co. v. Franklin etc. R. Co.*, 96 Va. 693, at pages 696-7, says:

"Before proceeding to examine critically the provisions of the lease, it is proper to observe that a court, in construing an agreement whose language leaves in doubt its meaning as to the particular matter in controversy, in order to ascertain the intention of the parties, should have regard to the occasion which gave rise to the contract, the obvious design of the parties, and the object to be attained, as well as to the language of the instrument itself; and give the agreement that construction which will effectuate the real intent and meaning of the parties as thus ascertained from the entire instrument, and by reference to the circumstances attending the making of it."

So, also, in the later case of *Albert v. Tidewater Ry. Co.*, 107 Va. 256, sustaining and quoting with approval the case last cited, the same court, at page 260, said:

"In the case last cited Judge Burks says: 'To ascertain the intent of the parties is said to be the fundamental rule in the construction of agreements (*Canal Co. v. Hill*, 15 Wall. 94, 21 L. ed. 64); and in such construction courts look to the language employed, the subject matter and surrounding circumstances. They are never shut out from the same

light which the parties enjoyed when the contract was executed, and in that view they are entitled to place themselves in the same situation which the parties who made the contract occupied, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described.' Citing *Nash v. Towne*, 5 Wall. 689, 699, 18 L. ed. 527; *Maryland v. Railroad Co.*, 22 Wall. 105, 22 L. ed. 713; *Moran v. Prather*, 23 Wall. 492, 501, 23 L. ed. 121."

The appellant's counsel, in their able brief, in discussing the status of the sprinkler system equipment, say that two questions are involved: First, is the system a fixture as between Holt, a conditional vendor, and the bank, a prior mortgagee? Second, if personal property, did it pass under the after-acquired property clause in the trust deed?

As to the first question, we submit that the inquiry has to be extended, and that the real question in issue is not whether the sprinkler system was a fixture as between Holt and the knitting mill company, but whether The Peninsula Bank, or Henley, trustee, had notice of such an agreement between the parties. If they had no notice, then it is immaterial for the purpose of this issue what the agreement was as to the sprinkler equipment. And so we submit that the long list of authorities cited at length by counsel for appellant on this point has no bearing upon the real question in issue.

The case *Evans v. Kister*, 92 Fed. 828, decided in 1899 by the Circuit Court of Appeals for the Sixth Circuit, Circuit Judges Wm. H. Taft and Horace H. Lurton presiding, is perhaps as near in point as any case that can be found. There the Commercial Electric Company of Indianapolis,

Indiana, agreed to sell two standard 100 K. W. generators, with switchboards, etc. The terms of the contract are almost identical with the terms in the contract between Holt and the knitting mill in the case at bar, and the finding of facts by the master are also in accord with the finding of the master in the case at bar. On page 831 the master says:

"That, when the machinery came to Bowling Green, it was placed upon and fastened to stone foundations, which had been prepared for it in the railway company's power house; that it was absolutely necessary that this machinery should be fastened to such foundations in order to use it for the purpose for which it was intended; that defendant, Kister, knew, at the time he signed the note, of this necessity; that he knew at the time it was being put into the building and fastened to the foundations that it was being so put in and fastened; and that the electric company aided and assisted in thus attaching the machinery to the realty; that it was so attached before the maturity of the note; and that at said time there was upon the property of the railway company a mortgage for some \$50,000."

With the facts above cited, the court, speaking through Judge Lurton, on page 836 said:

"Upon the other hand, if the machinery so purchased and set up has become so affixed as to be a part of the principal thing, it will pass under the mortgage, notwithstanding an agreement between the mortgagor and furnisher that the title shall remain in the vendor until payment. Mere registration of an agreement between the mortgagor and

vendor, preserving the personal character of property affixed to the freehold mortgaged, will not prevent the attached property from passing under a previously existing mortgage."

This case also destroys the force of the argument of the learned counsel for the appellant when they take the position that the sprinkler equipment was contracted to be sold prior to the deed of trust to Henley, trustee. For here the court holds that when the vendor knew at the time the property was being put into the building and fastened to the foundation that same would be covered by the existing mortgage on said property, he cannot be heard to afterwards assert his lien. See *Kane & Others v. Virginia Coal & Iron Co. & Others*, 97 Va. 329.

In this connection the court will not be unmindful of the fact that, while the deed of trust to Henley, trustee, is prior to the time that the sprinkler equipment was installed, it is nevertheless true that the contract relating to the sprinkler equipment antedated the deed of trust several weeks; and so we submit that, if the appellant could withhold from the record his contract until after the property had been conveyed to Henley, trustee, who occupies the position of an *innocent third party*, and then be permitted to come forward and assert his claim, the very object of the statute of Virginia (section 2462) would be destroyed.

In the case of *Phoenix Iron Works Co. v. New York Security and Trust Co.*, 83 Fed. 757, at pages 758-9, the court said:

"Machinery constituting the complete steam plant and motive power of a street railroad, when placed in its power house, becomes an integral part of the property, as a railroad system, and passes under mortgage, previously executed and recorded, cover-

ing the entire road and plant, constructed and to be constructed, though such machinery was placed in the building under a contract by which the seller reserved title until full payment was received therefor, which payment has never been made."

See *Kinhead v. United States*, 150 U. S. 485;
Van Ness & wife v. Pacard, 2 Pet. 137.

RESERVATION OF TITLE GOOD IN VIRGINIA.

We concede that a reservation of title is good in Virginia, as is the case in most states, but we deny that a reservation of title is good, except as between the parties thereto, unless docketed as required by the statute law of Virginia. Just here it is interesting to note the origin and objection section 2462 of the Code of Virginia and the construction placed thereon by the Supreme Court of Appeals of Virginia. That portion of said section which relates to the question at issue, as it now stands upon the statute book, reads as follows:

"Section 2462. Subdivision 1.—Every sale or contract for the sale of goods and chattels wherein the title thereto or a lien thereon is reserved until the same be paid for in whole or in part, or the transfer of titles is made to depend on any condition, and possession be delivered to the vendee, shall, in respect to such reservation and condition, be void as to creditors of and purchasers for value without notice from such vendee until such sale or contract be in writing, signed by both the vendor and vendee, in which the said reservation or condition is expressed, and until and except from the time that a memorandum of said writing, setting forth the

date thereof, the amount due thereon, when and how payable, and a brief description of said goods or chattels, be docketed in the clerk's office of the circuit or corporation court of the county or corporation in which said goods or chattels may be."

This enactment originated in the legislature of 1883-4 (Acts 1883-4, page 27), and it first provided that the contract be evidenced by writing, executed by the vendor, the said writing to be duly admitted to record in the county clerk's office in which the goods and chattels might be.

In order to make the provisions of this statute more convenient and less expensive, the legislature, in 1889-90, amended it by providing that the contract should be in writing and executed by both vendor and vendee, and should be docketed in the clerk's office and indexed in the name of both parties.

The object of this enactment was evidently to overcome the decision in the case of *McComb v. Donald's Administrator*, 82 Va. 903, and it will be observed the contract therein referred to was made April 4, 1881, prior to the enactment now being considered.

The court fully construed this statute in the case of *Arbuckle Bros. v. Gates & Brown*, 95 Va. 802, 4 Va. Law Reg. 237, 30 S. E. 496, cited by the Circuit Court of Appeals (record 112), in which case the court, in delivering its opinion, on page 812 said:

"Conceding for the purposes of this case that, although the agreement constituted a sale and not an agency, there was a valid reservation by Arbuckle Brothers of the title to the coffee until the same was paid for, it was still necessary that the agreement be duly docketed according to the provisions of sec.

2462 of the Code as amended, or such reservation was void as to creditors and purchasers for value without notice.

"A trustee in a deed of trust to secure creditors is, under many decisions of this court, a purchaser for value. *Chapman v. Chapman*, 91 Va. 400, and the cases there cited. It was, however, earnestly contended by the counsel for the appellants that H. C. Boudar, the trustee in the assignment of Gates & Brown, was a purchaser—not without but with notice. The burden was on the appellants to prove notice."

This case also holds that a trustee in a deed of trust to secure creditors is a purchaser for value.

The case of *Monarch Laundry Co. v. Westbrook*, 109 Va. 382, does not support the contention of appellant's counsel, nor does it overrule, or undertake to overrule, the decision in *Arbuckle Bros. v. Gates & Brown*, *supra*, but only holds that if a vendor has complied fully with the statute, and the property sold by him is such that it can be easily removed without injury to the land, and not impair the plant, that they will be regarded as personal property, because the vendor, by complying with the statute, has given notice that he reserved a lien upon such property.

The question of whether in Virginia a lien can be reserved upon a thing which ordinarily attached to the freehold, and be treated as personal property, has no bearing on the case at bar, as stated by the learned judge of the District Court. (Record 90.)

"Whatever may have been the rights of the vendor in the property thus put upon, and which forms part of the real estate, or the correct method of legally

prosecuting and securing such right, had the same been timely and appropriately taken, under the law of the State of Virginia, it is immaterial to determine here, for the reason that the vendors in this instance *recorded no lien, and took no steps whatever to save their rights, if any they had, against those of the existing mortgagee*; (Italics ours.) and hence, as between the two claimants of liens, the mortgage takes precedence."

In re Nelson, 191 Fed. 233, on page 236, the court said:

"A creditor holding a lien against this bankrupt, having no actual knowledge of the existence of this conditional sale contract, under the statutes of South Dakota, would have a claim superior to the rights of the vendor of the property."

REGARDLESS OF QUESTION OF FIXTURES, HOLT'S CLAIM IS
NOT VALID, AND THE WEIGHT OF AUTHORITY IS
AGAINST IT.

Counsel for appellant undertake to say that The Peninsula Bank is neither a creditor nor purchaser within the contemplation of the statute—section 2462—but the court will observe that they have been unable to produce any authority sustaining this contention. It is immaterial what construction has been placed upon statutes in other states by various courts.

In *Kesner V. Trigg*, 98 U. S. 50, a case which came from Virginia, on page 53, the court said:

"No notice of any infirmity in the title of Kesner

to the premises is brought home, either to the trustee, or the *cestui que trust*, and it is denied by the latter. Like a mortgagee, they are regarded as purchasers; *bona fide*, and without notice of the adverse rights of the appellant, if any she have."

Citing *Wickham & Goshorn v. Lewis, Martin & Co.*, 13 Gratt. (54 Va.) 427.

See *New Orleans Canal & Banking Co. v. Montgomery*, 95 U. S. 16.

In *Wickham & Goshorn v. Lewis Martin & Co.*, 13 Gratt. (54 Va.) 427, just cited, on pages 436-7, the court said:

"There is some contrariety in the decisions of other states as to whether a deed of trust, by the vendee, for the security of pre-existing debts simply, places the assignees in any better position to dispute the claim of the cheated vendor than the fraudulent vendee had, at the date of such assignment. In most of the cases, however, I think it will be found that the question turned on the further question, whether the trustees or creditors ought to be treated as purchasers for value; and that when the latter question has been decided in favor of the assignees, they have been generally protected against the claim of the original vendor.

"And I think it has been the constant course of the courts in this state to regard the creditors in a deed of trust, made by their debtor, *bona fide* for their indemnity, in the light of purchasers for value."

The case of *Chapman v. Chapman and others*, 91 Va.

397, holds that trustees under deed of trust to secure antecedent debts were purchasers for value.

In the case of *Monarch Laundry Co. v. Westbrook*, 109 Va. 382, which is cited by counsel for appellant, the court on page 384 said:

"We consider it unnecessary to review at length the history, purpose and policy of the statute, section 2462 of the Code, *supra*. Suffice it to say, that previous to this statute, the law of the state was, that where a vendor agreed to sell personal property for a price to be paid at a future time, and delivered the possession, but expressly retained title to the property until payment, such an agreement constituted a conditional sale; and though by parol or by an unrecorded instrument, such reservation was valid as against vendees, creditors, and subsequent purchasers, with or without notice. Whereupon, the statute, now section 2462, *supra*, restricted that doctrine for the protection of innocent third parties (*italics ours*) by providing that such reservation of title should be void as to them unless recorded in such a way as to give notice."

The contention cannot be successfully made that either Henley, trustee, or the bank had actual knowledge of the contract between Holt and the knitting mill, and it is admittedly true that the contract was never docketed, nor recorded in the clerk's office of the county of James City or city of Williamsburg.

Evans v. Kister, 92 Fed. 828.

Monarch Laundry v. Westbrook, *supra*.

Hash v. Lore, Davault & McKarney, 88 Va. 715.

Willard S. Brown, et als. v. Grand Rapids Porter Furniture Co., 23 L. R. A. 817; 58 Fed. Rept. 286.

Murray v. Farmville & Powhatan Ry. Co., 101 Va. 262; 43 S. E. 553.

Arbuckle Bros. v. Gates & Brown, supra.

Having seen that Henley, trustee, *was an innocent third party*, it seems to us immaterial as to whether the sprinkler equipment was a fixture or after-acquired personal property. Certainly there was nothing to have prevented the appellant, before he installed the equipment, from ascertaining from the records in the clerk's office, which was the best evidence, and open to him, that the property which he was about to install would be fastened by the lien of the deed of trust then in force, and when he installed the said equipment, he did it at his own peril. While, on the other hand, had Holt docketed or recorded his contract reserving lien, if any he had, when it was signed and executed, certainly the bank would not have made the loan of twelve thousand dollars; for it went to the precaution of having the title to the property carefully examined. (Record 48, 49, 50.)

While it is true that the case of *Murray v. Farmville, etc.*, 101 Va. 262, cited by appellant, and also by us *supra*, holds that at common law a valid mortgage could not be made to cover after-acquired property, it distinctly decided that the rule is otherwise in equity, and assigns the reasons therefor.

The appellant has selected a court of equity in which to prosecute his claim. His petition sets up an equitable claim to the property therein mentioned, or the value thereof. (Record 1-4.) The petition also alleges that The Peninsula Bank had actual notice of the rights of the petitioner. (Record 3.) To this petition, Henley, trustee, filed his

answer (Record 13-14) denying any knowledge whatever of the claim of the appellant; and the bank also answered said petition (Record 16), whereby it averred and charged that it had no notice, actual, constructive, or otherwise, of said appellant's claim.

The issue was here made, and the burden was on the appellant to prove notice.

Arbuckle v. Gates & Brown, 95 Va. 812, *supra*.

Chapman v. Chapman, 91 Va. 400.

Best v. Michie, 31 Gratt. 149.

Johnson v. National Exchange Bank, 33 Gratt. 473.

Morrison v. Bausemer & Co., 32 Gratt. 225.

See Kinhead v. United States, 150 U. S. 485, *supra*.

Van Ness v. Pacard, 2 Pet. 137, *supra*.

EFFECT OF AFTER-ACQUIRED PROPERTY CLAUSE.

As we have already seen, it is immaterial whether the system installed by appellant passed under the after-acquired property clause in the deed of trust, as it has been clearly shown that it became a fixture under the authorities cited, yet we deem it proper to reply to that portion of appellant's brief dealing with this question.

In the first place, we take issue with the learned counsel for the appellant, wherein they undertake to show that there appears to be a confusion on the part of the learned judge of the District Court in his opinion, as well as the opinion of the Circuit Court of Appeals. On the contrary, we submit that the opinions in this case are clear, concise, and convincing, and are fully supported by the authorities cited.

It is true that the courts, as well as the referee in bankruptcy, concluded from the evidence in the case that the

sprinkler equipment in the nature of things became a fixture, and there is absolutely no evidence to the contrary, but the court very clearly points out that the after-acquired property clause in the deed of trust to Henley, trustee, is sufficiently full to cover the property in question, irrespective of whether it is a fixture or whether it remained personalty. (Record 89, 90.)

Can there be any question of doubt that the interest of the bank is materially affected by this contract? The loan was made partly in view of the fact that Bird's policy was to put in improvements from time to time. (Record 36.) And further because there were no liens against it. (Record 49, 50, 51.)

In *Tippett & Wood v. Barham*, 180 Fed. 76, the court, in dealing with the after-acquired property clause, on page 79 says:

"There is a line of cases which, with more or less unanimity, holds that where a mortgage exists on real estate, and an accession is subsequently made of property agreed between the vendor and the mortgagor to be treated as personalty, and a reservation of title until paid for agreed upon between vendor and mortgagor purchaser, such accession, if it can be severed from the realty without injury to the latter or to the value of the security for the mortgage debt as it stood before the improvement was made, will be impressed with the same character as between the vendor and the mortgagee as between the vendor and mortgagor; in other words, that it does not become real estate, and may be removed without invading the rights of the mortgagee. Of this class are *Campbell v. Roddy*, 44 N. J. Eq. 244, 14 Atl. 279, 6 Am. St. Rep. 889; *Binkley v. Forkner*,

117 Ind. 185, 19 N. E. 753, 3 L. R. A. 33; *German Savings & Loan Society v. Weber*, 16 Wash. 95, 47 Pac. 224, 38 L. R. A. 267; and *Northwestern Mut. Life Ins. Co. v. George*, 77 Minn. 319, 79 N. W. 1028, 1064, and these cases and some others support this doctrine more or less completely.

"Upon the other hand, there are many cases (some of which will be hereinafter referred to) which hold that personal property incorporated into or affixed to real estate in such manner that it would be subject to the lien of an existing mortgage thereon as between the mortgagor and mortgagee will be so subject to the lien of the mortgage, notwithstanding the existence of an agreement between the vendor and the mortgagor that it shall retain its character as personal property, unless the mortgagee be also a party to such agreement. This is what is generally known as the Massachusetts rule, and it has been affirmed by many other courts of last resort, and particularly by the Supreme Court of the United States in several cases hereinafter separately referred to.

"We think this latter doctrine announces the correct principle, especially where the application is, as in the present case, confined to a case wherein the mortgage (containing an after-acquired property clause) has been drawn for the purpose of embracing the entire working plant of the corporation, including its franchise, as in such cases it is usually true, that the mortgage is given at a time when the real estate is but very insufficient security for the debt, and the subsequent accessions are very generally made by the expenditure of the funds derived by reason of the negotiation of the bonds secured

by such a mortgage, and the mortgage is made and received in contemplation of such accessions. In such cases the equities of the beneficiaries under the mortgage should and must attach to such accessions as, under the description contained in the mortgage, are included within it, unless some higher equity or legal title intervenes."

Is there any thing in the case at bar to take it out of the general rule laid down in *Tippett & Wood v. Barham*?

It is a well known principal that the Federal court adopts the construction placed upon the statute of a state by its court of last resort. See

Wilkins Company v. Coler, 180 U. S. 177.

Stanley Company v. Coler, 190 U. S. 457, etc.

Bearing this in mind, we submit that the learned judge of the District Court and the Circuit Court of Appeals did not err in following the decision laid down in *Arbuckle Bros. v. Gates & Brown*, 95 Va. 802, *supra*. See, also, *Hart v. Haynes*, 1 Va. Dec. 201, which holds that the judgment creditors have priority over the vendor in an unrecorded executory contract of sale.

This court has decided in the case of *United Liners Telegraph Company v. Boston Safe Deposit & Trust Co.*, 147 U. S. 431, that after-acquired property described in the mortgage becomes subject to the mortgage as fast as it is acquired.

In the case of *Pennock, et al. v. Cole, et al.*, 23 How. 117, the question of after-acquired property came squarely before the court upon the claim of the bondholders under the mortgage on the one hand, and judgment lien creditors

on the other, and the court, in passing upon this question, page 130, said:

"In conclusion upon this point we are satisfied that the mortgage attaches to the future acquisitions as described in it, *from the time they come into existence.*" (Italics ours.)

In *Bear Lake Irrigation Co. v. Garland*, 164 U. S. 1, the court, on page 15, said:

"A clause in the mortgage which subjects subsequently acquired property to the lien after the mortgage is a valid clause.

"Most states by recent statutes, have in substance declared that no agreement that goods bargained and delivered to another shall remain the property of the seller, shall be valid as against innocent third persons, unless the agreement be in writing, duly acknowledged and filed for record."

Benjamin's Principles of Sales, (second edition), p. 99, citing—

Weil v. State, 46 Ohio St. 450.

Speyer v. Baker, 59 Ohio St. 11.

Collins v. Wilhoit, 108 Mo. 451.

Sheldon Co. v. Mayers, 81 Wis. 627.

Vorse v. Loomis, 86 Iowa 522.

Nat. Cash Register Co. v. Schwab, (Iowa 1900), 82 N. W. Rep. 1011; 111 Iowa 605.

Plow Co. v. Witham, 52 Kan. 185.

Knowles Loom Works v. Vacher, 57 N. J. L. 490.

Woolley v. Wagon Co., 59 N. J. L. 278.

- Osborne Co. v. Mfg. Co.*, 51 Neb. 502.
Dorntee Casket Co. v. Gunnison, 69 N. H. 297.
Davis v. Osgood, 69 N. H. 427.
In re Wilcox and Howe Co., 70 Conn. 220.
Hirsh v. Elevator Co., 53 N. Y. Supp. 664; 24 Mis.
 Rep. 472.
Babcock Co. v. Williams, 75 Minn. 147.
Brandon Printing Co. v. Bostick, (Ala. 1900), 28
 So. Rep. 705.
And see, Winchester, Etc. Co. v. Carman, 109
 Ind. 31.
Steele v. Aspy, 128 Ind. 367.

For authorities holding that where vendor, upon a conditional sale, has delivered specific goods, and vendee has taken possession and used them in all respects as his own, the vendor retaining title until full purchase price is paid, the vendee has an interest which he can convey, and attachable by his creditors, imposes upon vendee an absolute obligation to pay, and he is responsible for goods in the event they are destroyed by fire while in his possession. See

Tufts v. Griffin, 107 N. C. 47; 22 Am. St. Rep. 866;
 and cases there cited.

AUTHORITIES RELIED UPON BY COUNSEL FOR APPELLANT DISTINGUISHED.

Perhaps the case of *York Manufacturing Company v. Cassell*, 201 U. S. 344, is relied upon by counsel for appellant, as well as by counsel for the trustees in bankruptcy, with more force than any other case cited, and yet there is no difficulty in distinguishing this case from the case at

bar. In the York Manufacturing Co. case there were only two questions involved: (1) Whether the York Manufacturing Company had the right, under its conditional sale of the machinery to the bankrupt corporation, to take said machinery out of the premises where it was placed, *as against all except judgment or other creditors, by some specific lien*; and (2) Whether the adjudication in bankruptcy was equivalent to a judgment, attachment, or other specific lien upon such machinery. In passing upon the first question, the court determined that the mortgage of Wright & Ames was not a lien upon the machinery sold by the York Manufacturing Company, "because (says the court on page 351), *the mortgage was prior to the time when any of the machinery was placed upon the land. There was no clause in the mortgage covering after-acquired property.* * * * There are no creditors with any specific liens, nor is there any other mortgage, and there is no attachment."

The reasoning of the court is perfectly clear. No class of creditors, either by contract or by operation of law, had acquired any lien against the machinery, and, of course, between the parties the reservation of title was good. This case is very clearly and forcibly distinguished from the case at bar by the learned district judge, (Record 89, 90), to which special reference is here invited.

In the case at bar, there was an after-acquired property clause in the deed of trust, and moreover rights of creditors had intervened.

On the second proposition, the court very properly held that under the provisions of the bankrupt act as it then stood, the vendor's lien was good, for the reason that the trustees in bankruptcy simply stepped in the shoes of the bankrupt.

There can be no question of doubt that the decision in

this case and other similar decisions brought about the amendment of 1910.

The case of *Arctic Ice Machine Co. v. Armstrong Trust Co.*, 192 Fed. 114, relied upon by counsel for appellant, is not in point. There, the only question involved was between the trustees in bankruptcy and the vendor, and the court held that as the amendment was subsequent to the vendor's lien reserved, vendor was entitled to the property, but there, no third party holding liens either by contract or operation of law, was affected.

The case of *New Chester Water Co. v. Holly Manufacturing Co.*, 53 Fed. 19, turned upon the question of notice on the part of the New Chester Water Co., and the intention of the parties brought home to said company, which intention, under what is known as the Pennsylvania rule, was controlling.

In re Sunflower State Refining Co., 195 Fed. 180, it will be observed that the facts are entirely different from the case at bar. There, the contract reserving title and declaring the property should remain personalty, was duly recorded as required by the statute law of Kansas, and in the language of the court, "*became a valid chattel mortgage*," and the only question was whether it was a fixture. The facts show it could be removed without injury to the land, and further, that the contracting parties knew the machine would be used for manufacturing purposes, and hence, the lien reserved was valid. How different from the facts in the case at bar, where the water system of the entire plant would be destroyed if the property sold by Holt and put upon the premises were removed. It is *indispensable, fixed and immovable*.

The opinion in the case of *Manhattan Trust Co. v. Sioux City Cable Ry. Co.*, 76 Fed. 658, follows the decision in *Myer v. Carr Co.*, 102 U. S. 1, which decision, it will be

observed, was based upon a contract of lease, and not a contract of sale; and it is not difficult to reconcile this decision with the later cases on the subject, such as *Tippett & Wood v. Barham, supra*; *Union Trust Co. v. Southern Saw Mills, supra*; and other cases cited. Of course, where no title had passed, and where no sale was contemplated by the parties, the vendee had no title. Vendor and vendee occupied the relation of lessor and lessee. Moreover, the property leased consisted of railroad cars, which are, in their nature, portable and movable, and in no sense a fixture.

Having seen that the Federal cases cited in the brief of counsel for appellant are easily distinguishable from the case at bar, and having shown that the Federal rule is in accord with the Virginia rule, as enunciated in the case of *Arbuckle Bros. v. Gates & Brown, supra*, we deem it unnecessary to prolong this brief to the extent of considering the numerous authorities cited by appellant from the courts of other states, in support of what is generally known as the New Jersey rule, for which they contend.

PLACING ON PREMISES SUFFICIENT.

The contention is made that the property must be acquired and placed on the premises. In other words, the astute counsel for the appellant undertake to make the point that the after-acquired clause in the deed of trust to Henley, trustee, covers only such property *as is acquired and as is placed upon the premises*. This contention is almost too technical to be considered. It would be difficult to use language more expressive than that used in the after-acquired property clause, which is as follows:

"Together with the engines, boilers, fixtures, machinery, and all other appliances and equipment con-

stituting or in any wise whatsoever connected with the Williamsburg Knitting Mill Company's plant, in and upon the premises hereby conveyed, or which may be acquired and placed upon the said premises during the continuance of this trust; it being the true intent and purpose of this deed to convey to the said trustee the entire plant of the said Williamsburg Knitting Mill Company for the purposes hereinafter set forth." (Record 83.)

The whole context shows that it was the intent and purpose for this clause to apply to all property in any manner afterwards acquired, or in any manner afterwards put upon the said premises.

"And. A particle which expresses the relation of addition, but which is frequently construed as meaning 'or,' although it should never be so read unless the context favors the conversion, and sometimes in the sense of 'as well as.'" (2 Cyc. 286.)

This construction was put upon the word "and" in the case of *Willard S. Brown et als. v. Grand Rapids Porter Furniture Company*, in an able opinion delivered by Judge Taft, ex-President of the United States, in the U. S. Circuit Court of Appeals.

58 Fed. Rep. 286; 22 L. R. A. 817.

The moment that the sprinkler apparatus was placed upon the premises of the knitting mill, the lien of the deed of trust fastened thereon. There can be no question of doubt that the bankrupt company had absolute control of this property; that it used it as its own; and in point of fact,

the Peninsula Bank had no knowledge of the alleged claim of the appellant, and no means of ascertaining the terms of the contract under which the said sprinkler system had been purchased. There was no *valid lien* against the said sprinkler system at the time it was placed on the premises, in favor of the appellant, and the only way by which the appellant could have maintained a *valid lien* against the said property, under the authorities hereinbefore cited, would have been for him to have recorded or docketed his contract, which he absolutely failed to do.

THE BANK AND HENLEY, TRUSTEE, WERE NOT CHARGEABLE
WITH NOTICE OF HOLT CLAIM.

So far as Henley, trustee, is concerned, it will be noted that the allegation has never been made save in appellant's brief, that Henley, trustee, had any notice of the Holt contract, the allegation being that the bank had notice. (Record 3.) And there is not one scintilla of evidence, or one suggestion in this record, that Henley, trustee, had any knowledge whatever, or was imputed to have any knowledge of the alleged claim of the appellant.

The appellant further attempts, however, to bring knowledge to the bank because H. S. Bird, one of its directors, was the president and treasurer of said knitting mill, and consequently knew of the alleged claim of Holt and Company at the time the bank took the deed of trust referred to. The authorities on this point are almost too numerous and too unanimous to be cited, but the following are respectfully submitted:

Marshall on Corporations, p. 984-5-6.

"The doctrine that a principal is chargeable with

notice of facts known to his agent is based upon the ground that it is the duty of the agent to communicate his knowledge to the principal, and that it is to be presumed that he has performed this duty; and, as a rule, this presumption is conclusive. No such presumption can arise, however, where the agent is dealing with the principal in his own interest, or where, for other reasons, his interest is adverse to that of his principal, so that it is to his own interest not to impart his knowledge to the principal; and in such a case, the doctrine does not apply. It is well settled, therefore, as a general rule, that where a director or other officer is dealing with the corporation in his own behalf, or is, for any other reason, interested in a transaction adversely to the corporation, knowledge possessed by him in the transaction is not imputable to the corporation."

In re European Bank, 5 Ch. App. 358.

Lamson v. Beard, 36 C. C. A. 56; 94 Fed. 30.

Frenkel v. Hudson, 82 Ala. 158; 60 Am. Rep. 736.

Franklin Mining Co. v. O'Brien, 22 Colo. 129; 55 Am. St. Rep. 118.

First Nat. Bank of Williamantic v. Bevin, 72 Conn. 666.

Merchants' Nat. Bank of Kansas City v. Lovitt, 114 Mo. 519; 35 Am. St. Rep. 770; 2 Wilg. Cas. 1763.

Seaverns v. Presbyterian Hospital, 173 Ill. 414; 64 Am. St. Rep. 125.

Martin v. South Salem Land Co., 94 Va. 28 (58), and numerous cases cited.

Gemmel v. Davis, 75 Md. 546; 32 Am. St. Rep. 412.

Dickinson v. Central Nat. Bank, 129 Mass. 279;
37 Am. Rep. 351.

Innerarity v. Merchants' Nat. Bank, 139 Mass.
332; 52 Am. Rep. 710.

Dorr v. Life Insurance Clearing Co., 71 Minn. 38;
70 Am. St. Rep. 309.

State Bank of O'Neill v. Matthews, 45 Neb. 659;
50 Am. St. Rep. 565.

Graham v. Orange County Nat. Bank, 59 N. J.
Law, 225.

Casco Nat. Bank v. Clark, 139 N. Y. 307; 36 Am.
St. Rep. 705.

*Gunster v. Scranton Illuminating, Heat and Power
Co.*, 181 Pa. St. 327; 59 Am. St. Rep. 650.

*Lyndon Mill Co. v. Lyndon Literary and Biblical
Institution*, 63 Vt. 581, 25 Am. St. Rep. 783.

"This doctrine applies, for example, where a di-
rector or other officer of a corporation sells and con-
veys or mortgages land to the corporation, having
at the time knowledge of a prior unrecorded deed,
lease, or mortgage, or of other defects in the title,
or equities in favor of thrd persons."

Barnes v. Trenton Gas Light Co., 27 N. J. Eq. 33.

Wickersham v. Chicago Zinc Co., 18 Kan. 481; 26
Am. Rep. 784.

Frenkel v. Hudson, 82 Ala. 158; 60 Am. Rep. 736.

Higgins v. Lansing, 154 Ill. 301.

"This doctrine applies to dealings between a cor-
poration and a firm, of which one of its officers
is a member."

Seixas v. Citizens' Bank, 38 La. Ann. 424.

National Bank of Commerce of Pierre v. Feeney,
9 S. D. 550.

Seaverns v. Presbyterian Hospital, 173 Ill. 414; 64
Am. Rep. St. Rep. 125.

Atlantic State Bank v. Savery, 82 N. Y. 291.

"Knowledge of the president of a corporation of the insolvency of a firm of which he is a member is not notice thereof to the corporation, so as to invalidate a transfer of property by the president to it as security for pre-existing debts of the firm, the transfer being made to enable the firm to obtain further loans from the corporation."

Seixas v. Citizens' Bank, 38 La. Ann. 424.

"When a corporation deals with another corporation, of which its officer is also an officer or agent, or with a natural person, of whom he is also an agent, it is not chargeable with knowledge of facts possessed by him, if it does not relate to matters within his authority as officer, or if he is not acting as its agent in the matter."

In re Marseilles Extension Ry. Co., 7 Ch. App. 161.

First Nat. Bank of Rock Island v. Loyhed, 28
Minn. 396.

"And even when the officer is acting for the corporation in the matter, as well as for the other corporation or person, his knowledge is not imputable to the corporation, where the facts are such that the

other corporation or person is not under any duty to communicate them, or where it is not to his or its interest to communicate them. In such a case there is a conflict of interest and duty on the part of the officer, and there is no presumption either way as to his communication of knowledge. Thus, if one corporation borrows money from another, or enters into any other contract, through the intervention of a common officer, the latter corporation is not chargeable with the officer's knowledge that the money is borrowed or the contract made for an illegal or *ultra vires* purpose."

In re Marsailles Extension Ry. Co., 7 Ch. App. 161.

See, also, *Lyndon Mill Co. v. Lyndon Literary and Biblical Institution*, 63 Vt. 581; 25 Am. St. Rep. 783.

It is evident from the evidence that H. S. Bird was acting for the knitting mill in securing the loan from the Peninsula Bank. As a matter of fact, the records of said bank, introduced in evidence, show that he did not even vote on the proposition making the loan. (Record 35, 36, 49.)

It is difficult to understand how the knowledge which Bird then had in his breast, which was not divulged to any officer of the bank, and when he was acting with an eye singly to the interest of the knitting mill and not to the bank, could be imputed to said bank. (Record 49.) It is quite as difficult to see how knowledge could be imputed to the bank through Phillips, when in point of fact he was not in possession of such knowledge. He had no knowledge, actual or otherwise, of the claim asserted by appellant. (Record 49.) Neither did he have any knowledge of his having been elected a director of the knitting mill until

September 27, 1909, when he was told of his election by Bird, and then and there immediately resigned. (Record 49-50.)

Counsel for appellant also lay stress upon the fact that H. N. Phillips, cashier of the bank, was one of the directors of the knitting mill, but the learned counsel seem to lose sight of the fact that both Bird and Phillips testified that H. N. Phillips had no knowledge of his election as a director until the 25th day of September, 1909, on which date his resignation was offered and accepted, and that he had no knowledge of the claim of the appellant. And that Bird was acting for the knitting mill and not for the bank. (Record 30, 49, 50, 62.)

Phillips at no time had any stock in the knitting mill, was a dummy director, without any knowledge or consent on his part, and knew nothing of the business of said mill. We therefore submit that knowledge could not have been imputed to the bank, either through Bird or through Phillips, under the facts in this case and under the authorities above cited.

IF THE SPRINKLER SYSTEM IS NOT A FIXTURE, AND HOLT'S
LIEN IS INVALID, WHETHER THE PROCEEDS FROM THE
SALE OF SAID PROPERTY SHOULD GO TO THE
PENINSULA BANK OR TO THE TRUSTEES
OF THE BANKRUPT.

This question divides itself into two parts: First, what are the rights of the trustees in bankruptcy with respect to the said sprinkler system equipment as against Holt, the conditional vendor; and second, as against The Peninsula Bank of Williamsburg, beneficiary under the deed of trust to Henley, trustee, of November 23, 1909.

As to the first proposition, we concur with the position

taken by counsel for the trustees in bankruptcy, and the construction put upon the amendment of 1910 to the bankrupt law, in so far as same relates to the claim of appellant. As has been already pointed out in this brief, there can be no question that the decision in *York Manufacturing Company v. Cassell*, *supra*, and similar decisions, brought about the amendment of 1910. The object of this amendment is very clearly expressed in Report No. 691 of the Senate Judiciary Committee of the Sixty-first Congress, second session, wherein the York Manufacturing Company case is fully discussed, and to which reference is here invited.

In re Calhoun, 189 Fed. 537, it is held that a vendor under conditional contract, not recorded, loses his claim against the trustees in bankruptcy under the amendment of 1910.

See, *In re Hartdoge*, 189 Fed. 547.

The attention of the court is called to the able opinion of the learned judge of the District Court, wherein this matter is fully and ably discussed, along a line of reasoning to our minds conclusive of the issues. (Record 90 to 96.)

As to the second proposition, namely, What are the rights of the trustees in bankruptcy with respect to the said sprinkler system equipment as against The Peninsula Bank of Williamsburg, beneficiary under the deed of trust to Henley, trustee, of November 23, 1909, we are unable to follow the line of argument advanced by counsel for said trustees. There are only two theories, it seems to us, under which this contention can be made. The one is, that under the amendment of 1910, the trustees in bankruptcy occupy the position of a judgment lien creditor, whose judgment has been duly recovered and docketed, as required by the statute law of the State of Virginia. The other is, that the trustees in bankruptcy occupy the position of execution

creditors; that is to say, creditors who have reduced their claims to judgment, and had execution duly issued upon same, and placed in the hands of the sheriff for levy, in accordance with the requirements of the statute law of Virginia.

As to the first position, we deem it proper to refer to the statute law of Virginia, which is found in section 3567 of the Code, which reads as follows:

"Every judgment for money rendered in this State heretofore or hereafter against any person shall be a lien on all the real estate of or to which such person is or becomes possessed or entitled at or after the date of such judgment. When more than one judgment or decree is confessed or entered in vacation on the same day, they shall have priority as among themselves in the order with respect to the time when they are respectively confessed or received for record in the clerk's office of the court entering the same: provided, that when several judgments are confessed together they shall all be deemed to have been confessed as of the time the first was confessed, and the clerk shall enter such time on the margin of his order book. The lien of a judgment shall in no case relate back to a day or other time prior to that on or at which the judgment was rendered. This section is qualified by section thirty-six hundred and forty-nine and the three following sections."

In order for the lien of the judgment to fasten upon the property in question, we should be forced to first determine that the property in question was a fixture, or partook of the real estate, for manifestly a judgment lien under the statute law of Virginia fastens upon real estate and not upon personal property.

"It is a principal of real estate law that permanent improvements placed upon land become a part of the realty, and the owner must take notice that all liens which rest upon the fee will necessarily attach to such permanent structures as he may chose to erect."

1 Min. Real Prop., sects. 17 and 23.

See, *Nixdorf v. Blount & Others*, 111 Va. 127.

There can be no question of doubt that if the sprinkler equipment system furnished by Holt was a fixture, or if it partook of the realty so as to make it a part thereof, that it would pass under the deed of trust to Henley, trustee, for it will be borne in mind that the deed of trust to Henley, trustee, was duly recorded on the 23rd day of November, 1909 (Record 28, 88), and that the Williamsburg Knitting Mill Company was not adjudicated a bankrupt until September 7, 1910.

The Virginia statute, in dealing with the question of acts invalid as to creditors and purchasers, under chapter 109, section 2465, provides:

"Every such contract in writing and every deed conveying any such estate or term, and every deed of gift, or deed of trust, or mortgage conveying real estate or goods and chattels and every bill of sale or contract for the sale of goods and chattels when the possession is allowed to remain with the grantor (and any such bill of sale or contract shall be in writing and signed by the vendor), shall be void as to subsequent purchasers for valuable consideration without notice, and creditors, until and except from the time that it is duly admitted to record in the county or corporation wherein the property embraced in such contract, deed, or bill of sale may be:

provided, that the possession of any such estate or term, without notice of other evidence of title, shall not be notice to said subsequent purchasers for valuable consideration."

Therefore, admitting for the moment that the trustees in bankruptcy occupied the position of judgment lien creditors under the amendment to the bankrupt law, they are creditors with notice of the deed of trust to Henley, trustee.

On the other hand, we might concede for the sake of argument that the sprinkler system equipment furnished by appellant was a movable chattel, and such a class of property as might be reached by an execution in the hands of the sheriff. We might concede further that the trustees in bankruptcy under the amendment of 1910, have sued out a valid execution and placed same in the hands of the sheriff, to be levied upon said property, yet we submit that when the sheriff undertook to levy such execution, he would be confronted by the deed of trust to Henley, trustee, conveying in apt and appropriate terms all property upon the premises of the Williamsburg Knitting Mill Company. (Record 83.) And can it be successfully maintained that the sheriff, under the facts above stated, could levy upon the property already encumbered by a valid lien, and thus defeat a lien which had been created and protected as required by law?

Section 3587 of the Virginia Code provides what an execution may levy upon, and reads as follows:

"By a writ of *fiery facias*, the officer shall be commanded to make the money therein mentioned out of the goods and chattels of the person against whom the judgment is. The writ may be levied as well on the current money and bank notes, as on the goods

and chattels of such person, except such as are exempt from levy under chapter one hundred and seventy-eight; and, as against purchasers for valuable consideration without notice and creditors, shall bind what is capable of being levied on only from the time it is delivered to the officer to be executed. The lien of a writ of *fieri facias* under this section, on what is capable of being levied on but is not levied on under the writ on or before the return day thereof, shall cease on that day: provided however, that such lien may be enforced after the return day of the writ by proceedings under chapter one hundred and seventy-six, if such proceedings be commenced before that day."

See, *The Horner-Gaylord Co. v. Fawcett*, 50 W. Va. 487, (492-493.)

For the reasons given, and upon the authorities cited, we submit that there was no error on the part of the referee in bankruptcy, acting as master, nor on the part of the District Court, in ascertaining and determining that the sprinkler system equipment is subject to the lien of The Peninsula Bank of Williamsburg, Virginia under the deed of trust executed from the bankrupt to Norvell L. Henley, trustee, dated November 23, 1909, nor on the part of the Circuit Court of Appeals in affirming the decision of the District Court, and we therefore confidently ask that the decisions of the said court be not interfered with.

Respectfully submitted,

HENLEY, ANDERSON & HALL,
Counsel for The Peninsula Bank and Norvell
L. Henley, Trustee, Appellees.

Richmond, Va., January 14, 1914.

Norvell L. Henley
of Counsel

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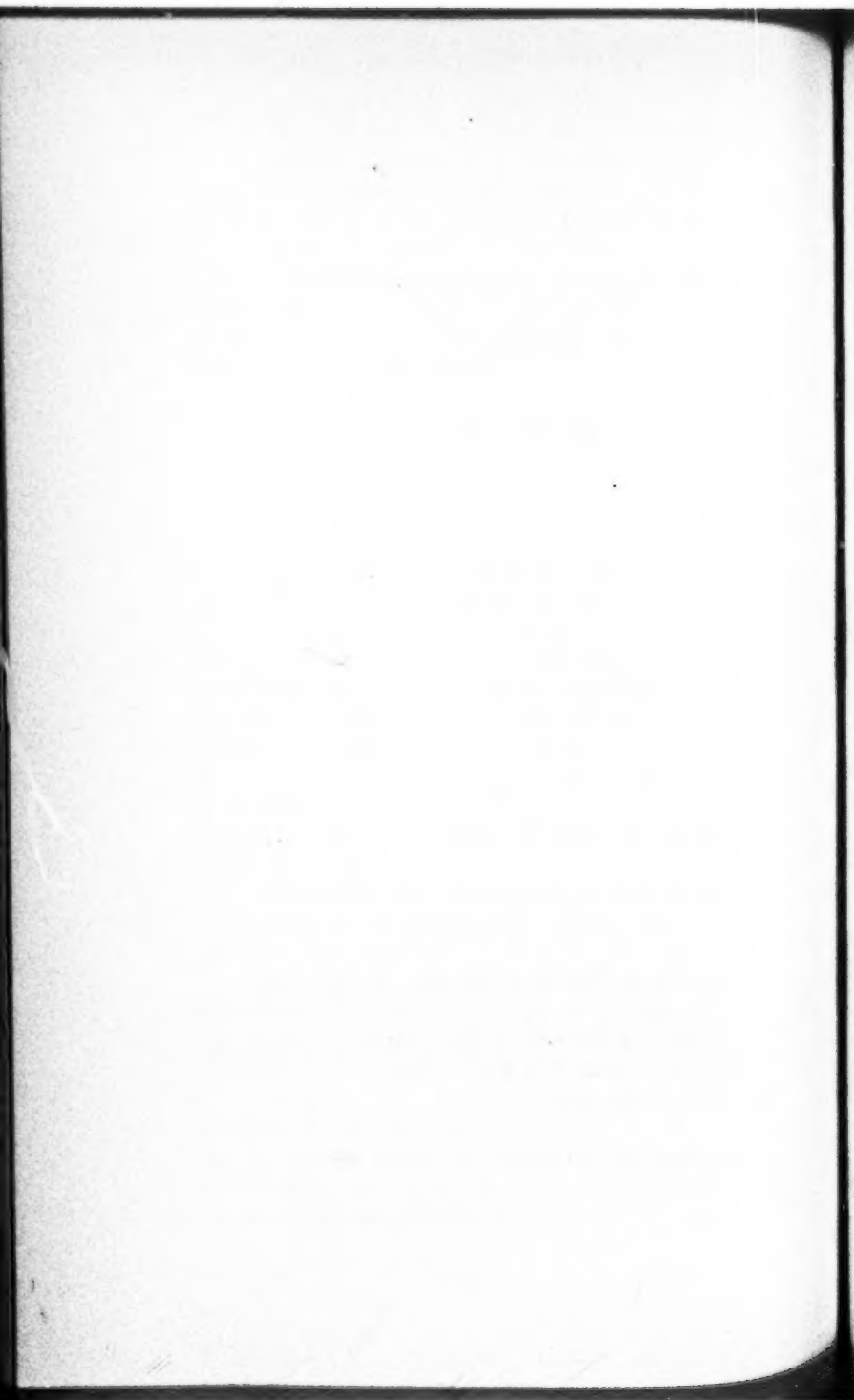
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United States Supreme Court,

OCTOBER TERM, 1913.

No. .

GEORGE H. HOLT, doing business as
GEORGE H. HOLT & COMPANY,
Appellant,

VS.

NORVELL L. HENLEY, Trustee, THE
PENINSULA BANK OF WILLIAMSBURG,
VIRGINIA, THE VIRGINIA TRUST COM-
PANY, Trustee, and H. N. PHILLIPS,
J. B. C. SPENCER, and WILLOUGHBY
T. COOKE, Trustees in Bankruptcy of
Williamsburg Knitting Mill Com-
pany, Bankrupt,
Appellees.

**REPLY BRIEF OF COUNSEL FOR H. N. PHIL-
LIPS, J. B. C. SPENCER AND WILLOUGHBY
T. COOKE, TRUSTEES IN BANKRUPTCY OF
THE WILLIAMSBURG KNITTING MILL COM-
PANY, BANKRUPT.**

Facts Stated.

The facts appearing from the record, in so far as they affect the rights of these appellees, herein-after referred to as the trustees in bankruptcy, are correctly set forth in the "statement of case" in the opening pages of the brief of counsel for Appellant Holt. They show that under contract, dated

August 25th, 1909, Holt installed, for use in connection with the knitting mill of the Williamsburg Knitting Mill Company a Sprinkler System designed to protect against fire; that work under the contract was begun in December, 1909, and completed in March, 1910; that the contract contained provisions whereby the property embraced in it was to remain personalty and the title to it was not to pass to the Company until the purchase price was fully paid and a bill of sale executed therefor; but that neither this contract nor any memorandum thereof was ever recorded or docketed as required by section 2462 of the Virginia Code; that on the 23rd day of November, 1909, before the work of installing said sprinkler system was begun, the Company executed a deed of trust to Norvell L. Henley, Trustee, for the benefit of the Peninsula Bank of Williamsburg, which deed of trust contains the after-acquired property clause set out at length on page 83 of the record; that upon its voluntary petition the Knitting Mill Company was adjudicated a bankrupt on the 7th day of September, 1910, and in due course these appellees were elected Trustees and as such acquired possession of the Knitting Mill plant, including the said sprinkler system.

Argument.

Upon the foregoing summary of facts, the questions which we now submit to the court are—*What are the rights of the Trustees in Bankruptcy with respect to the said Sprinkler System, first, as against Holt, the conditional vendor, and next, as against the Peninsula Bank of Williamsburg, beneficiary under the deed of trust to Henley, Trustee, of November 23rd, 1909?*

I.—The rights of the trustees in bankruptcy as against Holt.

Independent Statement of our view.

What would have been the rights of the trustees in bankruptcy as against Holt prior to June 25th, 1910, when the bankruptcy act was amended, is free from any sort of doubt. Prior to the amendment of that date, it had become the settled doctrine, conclusively established by a line of decision, ending with the case of *York Mfg. Co. v. Cassell*, 201 U. S., p. 344, that trustees in bankruptcy merely stepped into the shoes of the bankrupt, and where the registry laws did not require the recording or docketing of a conditional sale contract to make it valid as between the parties to it (and this is so in Virginia), neither did they require it as between the conditional vendor and the trustees in bankruptcy. Whether that interpretation of the act as it was prior to the amendment of June 25, 1910, was sound in reason or wise in policy has passed beyond the pale of judicial determination. We place no reliance upon *Bank v. Sherman*, 101 U. S., 403, (decided under the act of 1867), and *Mueller v. Nugent*, 184 U. S., 14, both cited and clearly distinguished in the lucid opinion of the learned District Judge in this case; nor upon the cases of *Chesapeake Shoe Company v. Seldner, Trustee*, 122 Fed., 593 and *Dollie v. Cassell*, 135 Fed., 52, since they were expressly overruled by the decision in *York Mfg. Co. v. Cassell, supra*, which is the same as *Dollie v. Cassell, supra*, under different style. We stake the contention we are about to make wholly upon the amendment of June 25th, 1910, to sub-section a, clause 2, section 47 of the bankruptcy act. This section prescribes the duties of trustees in bankruptcy. After imposing on them, in the language of the original act, the duty of collecting and reducing to money

the property of the estate for which they are trustees, it adds, by way of amendment:

"And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied." (Italics ours.)

The first matter to be determined then, is the meaning of the quoted language. One of the familiar rules governing the construction of a remedial statute is that the mischief which it was designed to correct must be looked to in determining its meaning. The mischief here is thus defined in *York Manufacturing Co. v. Cassell*, 201 U. S., at 352:

"We come, then, to the question, whether the adjudication in bankruptcy was equivalent to a judgment, attachment or other specific lien upon the machinery. The Circuit Court of appeals has held herein that the seizure by the Court of bankruptcy operated as an attachment and an injunction for the benefit of all persons having interests in the bankrupt's estate.

"We are of opinion that it did not operate as a lien upon the machinery as against the York Manufacturing Company, the vendor thereof. Under the provisions of the bankrupt act the trustee in bankruptcy is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued. At that time the right, as between the bankrupt and the York Manufacturing Company, was in the latter company to take the machinery on account of default in the payment therefor. The trustee, under such circumstances, stands simply in the shoes

of the bankrupt, and, as between them, he has no greater right than the bankrupt."

Now, that it was the purpose of the amendment in question to change the law as thus declared, is expressly stated in report No. 691 of the Senate Judiciary Committee of the Sixty-first Congress, Second Session, where it is said :

"One of the most important decisions under the present law is *York Manufacturing Co. v. Cassell*, (201 U. S., 344) wherein it was held that property covered by an unrecorded instrument, which would have been void in the State Courts had the property been taken by an assignee or receiver or levied upon by attachment or execution, was not void where possession was taken by a receiver or trustee in bankruptcy, the Supreme Court holding that the trustee stood precisely in the bankrupt's shoes with regard to the unrecorded instrument, even though in the State Courts had the seizure been made by an assignee in insolvency or receiver, or by the sheriff under execution or attachment, the unrecorded lien would have been void as against creditors. By this ruling the trustee in bankruptcy is held to be vested solely with the bankrupt's own title, except as to property fraudulently transferred and as to property which (within four months before the bankruptcy) has been seized by a creditor by legal process or voluntarily transferred to him by way of preference. The trustee, under the present law, does not (except as to fraudulently transferred property) take the rights that a creditor under State law might have acquired, but only such as some creditor has actually acquired by levy of process, and then only in the event that such levy has occurred within four months before the bankruptcy and the lien of the levy (otherwise void under Sec. 67-f) been preserved for the benefit of the trustee by order of Court. In this way a distinct advantage is given in

bankruptcy to the holders of unrecorded liens. The creditors' hands meanwhile are tied from making any levy, because the separate rights of the creditors have become vested in the trustee for all; besides which, as to the property already in the custody of the Bankruptcy Court, of course individual creditors would be in contempt of Court should they levy thereon. Thus the evil of secret liens has continued. It is this evil and the injustice worked upon creditors who rely upon the debtors' apparent ownership against which the bankruptcy law has set its face. The proposed amendment, whilst correcting the defect named, at the same time carefully guards the rights of all parties. It is evident that in the proposed amendment attempt is made to give effect to two ideas quite distinct: First, that as to the property in the custody of the Bankruptcy Court the bankruptcy trustee shall be considered to have the same title that a creditor holding an execution or other lien by legal or equitable proceedings levied upon that property would have under State law; and, second, that as to property not in the custody of the Bankruptcy Court the trustee should stand in the position of a judgment creditor holding an execution returned unsatisfied, thus entitling him to proceed precisely as an individual creditor might have done to subject assets. In this way, in effect, proceedings in bankruptcy will give to creditors all the rights that creditors under the State law might have had had there been no bankruptcy and from which they are debarred by the bankruptcy—certainly a very desirable and eminently fair position to be granted to the trustee."

Quoted in 3rd Remington, 331.

See to the same effect House proceedings, Congressional Record, 61st Congress, 2nd session, pp. 2552-4.

We next inquire whether the language employed in the amendment conveys the meaning intended

by those who used it. Mr. Remington says on same page:

"By the amendment of 1910 to the bankruptcy act, section 47a (2) 'this rejected doctrine' that bankruptcy operates as an 'equitable levy' as to property in the custody of the Bankruptcy Court—has become the accepted doctrine."

And Collier, in his last edition (1912), at pages 660-1 says:

"The words 'creditor holding a lien by legal or equitable proceedings' include a judgment creditor holding an execution lien. The purpose of Congress was to embrace within these words every class of creditors with liens by legal or equitable proceedings favored by the varying registration laws of each of the States. The registration laws of some States include but one of many classes of such creditors. In that case the purpose of Congress is not to be frustrated as to the included class because other classes included in the amendment were not included also in the registration act of that particular State. The breadth of language was used for the purpose of gathering in all classes protected by all local registration acts. This provision of the bankruptcy act puts the trustee, in so far as the assets of the estate are concerned, in the position of a lien creditor. If property coming into the custody of the court be claimed by another, the trustee is vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon. An agreement, therefore, which would previously have been valid between the parties—such for example as a contract of conditional sale—is no longer necessarily valid against the trustee. He is in the position of a creditor holding a legal or equitable lien, and the agreement is to be scrutinized from that point of view."

To quote from the opinion of Waddill, *D. J.*, in this case (Record, pp. 94 and 96) 190 Fed., 871:

"The language used in this amendment is clear and comprehensive, and as viewed by the Court, unequivocally gives to the bankruptcy proceeding the effect of a lien, as is contemplated by the York case, *supra*; and the same will suffice to give to those claiming rights by reason of the Bankruptcy Court proceedings, precedence over the unrecorded vendors lien under the Virginia statute."

And the Circuit Court of Appeals, in affirming the decision of the District Court, says, referring to the amendment of June 25, 1910:

"That act was intended to apply to every bankruptcy the petition in which was filed after its passage. The conditional vendor in this case had not recorded his contract. By the law of Virginia a lien creditor or a subsequent purchaser without notice was not bound by it. A trustee for creditors under a conventional assignment might ignore it. *Arbuckle Bros. v. Gates*, 95 Va., 802. Congress had the right to make it ineffective as against a Trustee in bankruptcy. An act of Congress may, to some extent, lawfully affect rights which had their inception before its passage. *Wilson v. Nelson*, 183 U. S., 191; *L. & N. R. R. Co. v. Motley*, 219 U. S., 480" (Record, p. 112).

There are numerous decisions of District Courts and Circuit Courts of Appeals in accord with the decisions of the District Court for the Eastern District of Virginia and the Circuit Court of Appeals for the Fourth Circuit in this case:

In re Bazemore, 189 Fed., 236;

In re Nelson, 191 Fed., 233;

In re Gehris-Herbine Co., 188 Fed., 502;

- In re Supply Company*, 189 Fed.,
 537;
In re Farmers Supply Co., 196 Fed.,
 990;
In re Kruger, 199 Fed., 367;
In re Franklin Lumber Co., 187 Fed.,
 281;
In re Gaglione & Son, 200 Fed., 81;
In re Farmers Co-op. Co., 202 Fed.,
 1008;
In re Osborn (C. C. A.), 196 Fed.,
 257;
Machine Co. v. Trust Co., 112 C. C. A.,
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In re Hartdagen, 26 A. B. R., 532;
Sturdivant Bank v. Schade (C. C.
A.), 27 A. B. R., 673;
In re Calhoun Supply Co. (C. C. A.),
 26 A. B. R., 528;
In re Stern & Levi, 26 A. B. R., 540;
In re Hammond, 26 A. B. R., 336.

Indeed, the only expression of a doubt that the purpose and effect of the amendment is that contended for by us, and expressly set forth in the Senate Committee's report, *supra*, is to be found in the case of *In re Lausman*, 183 Fed., 647.

It is evident from the opinion of the learned judge in that case that the argument of counsel, to the extent there was argument, was directed to the constitutionality of the amendment. There was only \$75.00 involved, and it is plain his Honor did not consider the view which we are now urging, for he makes no reference to the report of the Senate Committee or House proceedings. After a general statement as to the uncertainty of the meaning of the amendment, and the trouble it is likely to give the Courts (a statement which could not have been made had he read the Senate Committee's report,

certainly not without giving some reason for dissenting from the very definite purpose and effect of the amendment embodied in that report) he asserts that whatever the amendment may mean, it does not mean to change the rule of *distribution* prescribed by section 64, which includes among the debts entitled to priority those owing to any person who "by the laws of the states" is entitled to such priority. And having found, and properly, that under the law of Kentucky an undocketed conditional sale contract was valid against general creditors, he draws what, we submit, is the unwarranted conclusion that the construction of the amendment which we contend for would be to change the rule of distribution prescribed in section 64 of the bankruptcy act. The vice in this conclusion lies in its failure to recognize the fact that a valid law of the United States Congress designed to operate on persons and property in the State of Kentucky, *does in fact so operate*, and when Congress by the amendment of June 25th, 1910, declared that the effect of adjudicating a citizen of Kentucky a bankrupt was to give to his trustees in bankruptcy the position of lien creditors, that declaration became law in Kentucky, and while the law of that state, whereby an undocketed conditional sale contract was good against *general* creditors, still remained in force, it no longer applied to trustees in bankruptcy because they were, by the amendatory act of Congress, taken out of the category of *general* creditors *quoad* undocketed conditional sale contracts and placed in the category of *lien* creditors. The rule of distribution prescribed in section 64 of the bankruptcy act is not annulled, nor in the least modified. The effect of the amendment is simply to lessen the number of claims which will be entitled to priority under that section, and not to change the status, as regards priority, of those which are entitled.

To summarize our contention—every trustee in bankruptcy appointed since June 25, 1910, becomes vested with all the rights and remedies of a judgment and execution creditor of the bankrupt as of the date of the adjudication. In other words, the status of the trustees in bankruptcy of the Williamsburg Knitting Mill Company is just what the status of the creditors of that company would have been, in the absence of an adjudication, had all of such creditors procured judgment and had execution issued against the company and placed in the sheriff's hands on the date of the adjudication. Indeed, the act of the bankrupt in filing its petition was tantamount to a confession of judgment in favor of all its creditors. The contract reserving title, on which petitioner relies, would, by the plain terms of Section 2462 of the Code of Virginia be void as against such judgment creditors. And it follows necessarily that it is void, likewise, as to the trustees in bankruptcy.

Opposing Contentions Answered.

Coming now to consider the contentions made by counsel for appellant in opposition to the construction of the foregoing amendment contended for by us, it will be seen from what we have already said, that we make no issue with our able antagonists on most of the propositions of law asserted by them. We concede that the word "creditors" as used in section 2462 of the Code of Virginia means *lien creditors*; we concede that prior to the enactment of section 2462 of the Code of Virginia and apart from the provisions of that section the trustees in bankruptcy could not prevail, and no more could a judgment lien creditor; we concede that the trustees in bankruptcy are not "purchasers" within the purview of section 2462 of the Code, but we deny the proposition that the trustees in bankruptcy are not creditors within the purview of that section.

While it is true, as stated by opposing counsel, that the bankruptcy amendment of June 25, 1910, does not declare the trustees in bankruptcy in terms to be "creditors," but uses the language "*shall be deemed vested* with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings," we respectfully submit that the familiar mathematical maxim here applies that "things which are equal to the same thing are equal to each other." The word "deemed" is clearly used as synonymous with "regarded" and "treated."

The case of *Davis' Admr. v. Snead*, 33 Grat., 705, cited to the point that a receiver in a judicial proceeding is not a creditor, is beside the mark, for a receiver's status in Virginia is established by judicial decision, and he is uniformly held to be simply a custodian performing such ministerial duties as are expressly authorized by the Court appointing him; whereas, the status of a trustee in bankruptcy is defined by the bankruptcy act.

As for the contention on pages 95-96 of their brief that the word "property" as used in the amended portion of section 47, means the property of the bankrupt, the language is: "*And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed, etc.*" But granted that property of the bankrupt is meant, the moment the trustees are put in the position of judgment and execution creditors the failure of Holt to docket the memorandum of his contract required by section 2462 of the Virginia Code makes the sprinkler system equipment in controversy the absolute property of the bankrupt, *quoad* these trustees.

Amendment should have been to Section 70.

On pages 90-91 of opposing brief it is insisted that the failure to amend Section 70, "shows that

whatever else may be the meaning of Section 47a (2), Congress intended the Trustee to take only that title to property which the bankrupt himself had. The amendment to Section 47a (2) must then refer to the Trustee's duties as to property the title to which vested in him under Section 70, and since the title to this sprinkler system could not vest in the Trustees under Section 70, Section 47a (2) cannot apply to this sprinkler system."

It is clearly of no legal consequence to what section of the bankrupt act the amendment in question purports to be made; its intent and meaning being plain, every other term of the old act inconsistent with it must yield to this latest expression of the legislative will. But we submit that section 70 does not require any amendment to make it consistent with section 47a (2) as amended. Subdivision 5 of 70a in relation to property which passes to the trustees, embraces: "Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

Clearly this sprinkler system was such property as might have been levied upon and sold under judicial process against the Knitting Mill Company prior to bankruptcy, Holt's contract being off the record.

In this connection Mr. Collier says, in discussing the meaning of subdivision 5 of section 70a:

"Whether or not the property, prior to the filing of the petition, could have been levied upon and sold under judicial process against the bankrupt, must be determined by the local law. It must appear that the property in possession of the bankrupt is subject to claims or liens valid as against his creditors, otherwise it passes to his trustee. For instance, the validity of a chattel mortgage or contract of conditional sale depends upon state statutes; ordinarily the title of the property mortgaged or conditionally sold

is retained by the mortgagee or vendor, but if there is a failure to comply with a state law which affects the validity of the transfer, the property passes to the trustee of the mortgagor or vendee in the same plight and subject to the claims of general creditors, as though bankruptcy had not intervened. Unfiled chattel mortgages, in states where they are declared void as against creditors for want of filing, do not prevent creditors from levying judicial process upon the property therein described, and consequently such property responds to the text to be applied under Subdivision 5 of this subsection," citing numerous cases.

Collier on Bankruptcy, Edition 1912, page 1004.

But, while such property passed to the trustees under section 70, it passed to them in their capacity of representatives of the bankrupt debtor, and hence, prior to June 25, 1910, was subject to the unrecorded claim of the conditional vendor. The amendment of June 25, 1910, was not designed to change the status of the trustee's ownership; its design was to vest in the trustees in their capacity of representatives of the creditors a lien claim against the property which passed to them under section 70 superior to the undocketed contract claim of the conditional vendor. To avoid confusion of thought just here it is necessary only to keep in mind the dual relation of trustees in bankruptcy, representing, as they do, at once, the debtor and his creditors. Section 70 has to do with them in the former capacity; section 47 in the latter. And so it is, the amendment of June 25, 1910, having to do wholly with the rights and remedies of the creditors is properly placed in section 47, which prescribes the duties of the trustees as the creditors' representatives in the enforcement of their claims.

Amendment Retroactive (?)

It is insisted that to make the amendment of June 25, 1910 apply to Holt's contract is to make it retroactive when its terms do not so require. The fundamental error in the reasoning of counsel in support of this contention lies in the fallacious assumption that *this act of Congress* imposed the *duty of recordation* on their client,—the correct premise being that *the recordation act of the Virginia legislature*, section 2462 of the Virginia Code (set out on p. 16 of their Brief), passed long before his contract was made, *imposed that duty*. The amendment of June 25, 1910 merely increased the *existing* danger of the non-performance of an *existing* duty, precisely as that danger would have been increased had a new and easier mode of obtaining judgment been provided by the Virginia legislature on that day. Let us suppose, for example, that the Virginia legislature on June 25, 1910, had enacted a law allowing creditors to proceed by motion on short and informal notice to obtain judgment instead of or in addition to the ordinary, cumbersome and dilatory common law forms of action still in use there; and let us suppose that a creditor of the Knitting Mill Company, proceeding by such motion, had obtained judgment against the Knitting Mill Company before Holt docketed his contract. Would Holt be heard to say that this judgment is not valid as to him because the law providing the remedy by motion was passed after his contract was entered into? Or, suppose, subsequent to the recent Federal law conferring on U. S. District Courts the civil jurisdiction formerly exercised by the Circuit Courts, a non-resident creditor of the Knitting Mill Company had obtained judgment against it in a District Court—could Holt successfully contend that that judgment was invalid as to him, because when his contract was made

there was no law conferring on the District Court jurisdiction to render such judgment? No more can he sustain his present contention, for, as we will show more fully in our answer to his constitutional objections, this amendment of June 25, 1910 merely provides an additional means for the creation of lien creditors, to wit: adjudication in bankruptcy. To approach the subject from a different angle, let us suppose the Knitting Mill Company had been adjudicated a bankrupt prior to the amendment of June 25, 1910, and the trustees had contested Holt's rights as conditional vendor. He could then properly have replied that to make the act apply to trustees created before its passage would be to make it retroactive, when no such intent is apparent from its terms, but it is equally certain that its terms do embrace every trustee appointed subsequent to its passage. In the language of the *per curiam* opinion of the Circuit Court of Appeals in this case, "That act was intended to apply to every bankruptcy, the petition in which was filed after its passage" (Record, p. 112). A contrary opinion seems to have been held by the Circuit Court of Appeals for the Third Circuit in the case of *Arctic Ice Machine Co. v. Armstrong County Trust Co.*, 192 Fed., 114, cited on page 73 of brief of opposing counsel. In the opinion in that case it is said: "To hold that the amendment divested the vendor of its reserved title is, independent of any constitutional question, to give it a retroactive effect not consistent with any expressed intent of Congress."

With deference, we submit that the amendment did not, of its own force, divest the vendor of his title. Indeed, the amendment is limited in its declared scope to bankrupts and their creditors; it does not operate directly on the conditional vendor and if he be injured as the result of its passage, it is an incident and an accident, due, primarily, not

to its passage but to the existence of some state law enjoining a duty which he has failed to perform.

In our case the Virginia law antedating the Holt contract said to him: "You must docket a memorandum of your contract or run the risk of having the claims of lien creditors of your debtor fasten on your property." The Federal law of June 25, 1910, said to him: "Henceforth the effect of an adjudication in bankruptcy will be to make the Trustees of the bankrupt lien creditors to the same extent as if they had procured judgment by suit or confession; hence your risk in keeping your contract off the record is increased."

The Arctic Ice Machine Company case *supra*, has been noticed in three subsequent cases.

In re Smith, 198 Fed. 876, distinguishes it on the facts and so avoids approving or disapproving it in terms, but in the opinion this significant language is used:

"Has the amendatory act done anything more than in some degree possibly to change the hazard by introducing the trustee into the class or classes permitted by the State statute to question such mortgage if not filed or renewed?"

In re Schneider, 203 Fed. 589, in the District Court of the Eastern District of Pennsylvania, follows the Arctic Ice Machine Company case because bound by it, and so states.

In re Farmers' Co-operative Company, 202 Fed. 1010, contains a vigorous dissent from it, the opinion saying:

"The contract of February 23, 1910, was made prior to the act of 1910, amending Section 47 of the Bankruptcy Act and the referee, for this reason, held, following *Arctic Ice Machine Co. v. Armstrong County Trust Co.*, 192 Fed. 114, that the act of 1910 did not apply to articles furnished under that contract and directed the trustee to re-

turn them to the Harvester Co. The case cited is not a binding authority on this court, but, owing to the eminent court by which it was rendered, I feel great reluctance in taking a different view of the statute from that there adopted. The question, however, was not very fully considered, and it seems to me that the decision proceeds upon a wrong interpretation of the act. The history of the statute, as given by Remington, Vol. 3, page 331, and explained in *Re Farmers' Supply Co.*, 196 Fed. 991, and in *Re Williamsburg Knitting Mill Co.*, 190 Fed. 871, shows that it was purely remedial, intended to correct a misinterpretation of the bankruptcy act by the courts. This view is also manifest on the face of the statute. It declares that trustees in bankruptcy 'shall be deemed' vested with all the rights, remedies, etc. It, therefore, gives a rule of interpretation rather than a substantive right. Remedial and curative statutes may properly be given a retrospective effect. Sutherland on Statutory Construction, Sections 482-483. The rule is peculiarly applicable in the present case, for the invalidity of the unfilled contract was created, not by the amendment of Section 47, but by the State statute which was in force at the time the contract was made. All the federal law does is to give effect to the invalidity already declared by the State law. It simply enables the trustee as the representative of creditors to assert the same rights which the creditors themselves would have possessed if the bankruptcy had not intervened. Another reason for this interpretation is found in the fact that the statute is part of a bankruptcy act and that act generally applies to contracts made prior to its adoption, the same as to subsequent contracts. The case comes clearly within the principle enforced by the Supreme Court in *National Surety Co. v. Architectural Decorating Co.*, 226 U. S., 276; *Bernheimer v. Converse*, 206 U. S., 516; *Pittsburgh Steel Co. v. Baltimore Equitable Society*, 226 U. S., 455."

The obvious want of analogy between the case at bar and the case of *Winfree v. Mo. P. Ry. Co.* and the other cases relied on by opposing counsel under this division of their brief, makes any attempt at differentiating them, in our judgment, unnecessary.

Constitutional Objections.

It is insisted that this amendment, if given the construction contended for by us, is beyond the power of the Federal Congress to enact.

(a) *Attempt by Congress to Amend State Statute.* It is urged on page 62 of opposing brief that the construction placed on the amendment by the lower courts amends the Virginia statute by adding another class of persons as to whom undocketed contracts shall be void. That Congress cannot amend a State statute we concede, but the fault in this reasoning lies in the failure to distinguish between *the addition* of a new class and *the increase* of the number of those coming within the class "creditors" already named in the statute. By this amendment Congress has said that the word "creditors" found in the statute shall embrace not only those who reduce their claims to judgment more than four months prior to bankruptcy, but as well also trustees in bankruptcy for the benefit of those holding claims at the date of adjudication, who have not reduced the same to judgment prior to the said four months' period. If Congress has not the power to enlarge the number of those falling within the class "creditors," no more can it lessen that number; and yet nobody, so far as we are advised, has ever questioned the constitutionality of that section of the bankruptcy law which annuls all judgments obtained within four months prior to adjudication. Congress no more amends the Vir-

ginia Statute, we submit, in the former case than in the latter.

(b) *Property taken without due process of law.* It is further insisted that the attempt of Congress thus to confer upon trustees in bankruptcy the rights, remedies and powers of judgment creditors is to take Holt's property without due process of law, and numerous authorities are cited to the point that laws which have the effect of confiscating property or arbitrarily transferring it from one person to another, are violative of that safeguard of the Federal Constitution. In other words, it is insisted that the effect of the amendment, as construed by us, is tantamount to a law declaring that property which to the time of the passage of the law was A's should thereupon become B's (Opposing Brief, pp. 64-70).

Again, we find no fault with the law invoked, but with its application. By the amendment of June 25th, 1910, Congress declared, in effect, that proceedings in bankruptcy, beginning with the petition for adjudication and ending with the order of adjudication, should produce the same result in favor of the general creditors of the person so adjudicated, or rather in favor of his trustee in bankruptcy as the representative of such creditors, as would be produced by proceedings brought by the creditors themselves to obtain judgment on their claims, ending in the entry of such judgments. In the latter case, certainly, Holt could not complain. Why, in reason, can he complain any more in the former? In neither case would he be in any sense a party to the proceedings, nor would he be given any notice of their pendency. Where, in principle, lies the difference, so far as due process of law is concerned, between proceedings against the Williamsburg Knitting Mill Company in the United

States *District Court*, resulting in a judgment lien in favor of its creditors by reason of its being adjudicated a bankrupt, and proceedings against it in the same Court, resulting in judgment liens in favor of its creditors (assuming they were non-residents) by reason of suits brought by them in that Court? Or, to make the illustration more apt, since the instant case is one of voluntary bankruptcy: Where lies the difference, in principle, so far as due process of law is concerned, between investing the trustees in bankruptcy of the Williamsburg Knitting Mill Company with the rights of judgment lien creditors by virtue of its being adjudicated a bankrupt on its own petition in the United States *District Court*, and converting its general creditors into judgment lien creditors upon a confession of judgment which it might make in the United States *District Court*, assuming of course, the creditors were such as might sue in that court? As already suggested, Holt would not be a party to either proceeding, and would not be entitled to any notice of either. The proceedings in each case would concern only the debtor and his creditors. In the respective cases the United States *District Court* would be exercising its jurisdiction in the respective modes prescribed by the Federal Constitution and laws. How then can it be conceded that the result attained in the case of the confession of judgment would be arrived at by due process of law, and successfully contended that the result attained in the case of the adjudication in bankruptcy would not be arrived at by due process of law?

(c) *Rule of uniformity violated.* It is further insisted that the rule of uniformity enjoined by the Federal constitution is violated (Opposing brief, page 63). In the opinion of Fuller, C. J., in

Hanover National Bank v. Moyses, 186 U. S., 181, it is said:

"The laws passed on the subject must, however, be uniform throughout the United States, but that uniformity is *geographical* and *not personal*, and we do not think that the provision of the act of 1898 as to exemptions is incompatible with the rule." (*Italics ours.*)

To show that the geographical uniformity will be destroyed by giving the amendment our interpretation, counsel use this illustration: If A goes into bankruptcy holding two pieces of property under conditional sale purchase, one from B whose contract is docketed, the other from C whose contract is not docketed, B would be protected and C would not; and from this they conclude—"The same class of persons in the State would not receive the same consideration under the bankrupt law, and inequality would follow." Can anything be plainer than that our friends' illustration, if it shows any lack of uniformity at all, shows lack of "personal" uniformity, not "geographical."

Besides B and C are not in the same class, one having complied with the registration laws, and the other not having done so.

(d) *Obligations of contract impaired.* It is said on pages 71-2 of their brief that the spirit of that provision of the Federal Constitution, which denies to the States the right to pass laws impairing the obligations of contracts, is violated by the amendment of June 25, '10, and by way of emphasis it is declared at the foot of page 72:

"If Congress possesses the power claimed for it here, bailments may be destroyed, liens disregarded, and a friendly loan of chattels for temporary use made the means of increasing dividends to general creditors."

Again, we repeat that not Congress, but the Virginia legislature, is responsible for the recordation statute which condemns the secret claim of Holt as against the lien creditors of his vendee.

The bankruptcy law ties the hands of general creditors, cuts off all opportunity for acquiring the status of lien creditors on their own initiative and it is only just to them that it should give them that status through the trustees. Nor can this policy lead to the destruction of bailments or the conversion of friendly loans of chattels into bankruptcy assets, until the *State laws* empower *lien creditors* to work these hardships.

(e) *No time provided in act for compliance.* The remaining constitutional objection is that the amendment is void as to Holt because it does not allow a reasonable time within which he might record his contract before it should affect him. This objection is, as we understand it, comprehended in the one which insists that the constitutional inhibition to the States to pass laws impairing the obligation of contracts is infringed by this Federal act, and we are content with the answer made under that head. We may add, however, that if time should have been allowed Holt in which to record his contract, the place for the allowance was the State statute which alone enjoined the duty of recording. As matter of fact he had ten weeks.

II.—The rights of the Trustees in Bankruptcy as against the Peninsula Bank of Williamsburg.

Sprinkler System Did Not Pass under After-acquired Property Clause in Bank's Mortgage.

The status of the Peninsula Bank of Williamsburg is that of a mortgagee of the Knitting Mill

plant under deed of trust to Henley, Trustee, executed on November 23rd, 1909, which deed of trust contained the following after-acquired property clause:

"Together with the engines, boilers, fixtures, machinery, and all other appliances and equipment constituting or in any wise whatsoever connected with the Williamsburg Knitting Mill Company's plant, in and upon the premises hereby conveyed, or which may be acquired and placed upon the said premises during the continuance of this trust; it being the true intent and purpose of this deed to convey to the said Trustee the entire plant of the said Williamsburg Knitting Mill Company for the purpose hereinafter set forth."

In the month following the execution and delivery of this mortgage, the installation of a sprinkler system equipment was begun, and completed in March, 1910, under a contract between the Knitting Mill Company and Holt, the vendor, whereby said equipment was to retain its character of personalty and remain the absolute property of Holt until fully paid for and then a bill of sale was to be executed by Holt conveying it to the mill. Now, if the contention made by us in the former half of this brief be sound, namely, that as to the trustees in bankruptcy, the sprinkler system equipment is to be regarded and treated as the absolute property of the Knitting Mill Company from the time of its installation, just as though the reservation of title had never existed (and this because of Holt's failure to docket a memorandum of his contract) the query next arises: Is our judgment lien (for we are now proceeding on the assumption that the Court will treat us as judgment creditors) superior to the lien, if any, which the Peninsula Bank has

against the said sprinkler system equipment by virtue of its said mortgage?

Now, it is to be observed that the contract between Holt and the Knitting Mill Company whereby the sprinkler equipment was to remain the property of Holt until fully paid for, although undocketed, was valid and binding, not only as to the Knitting Mill, but *as to everybody in the universe*, except two classes of persons, namely: creditors and purchasers for value without notice (Va. Code, section 2462). That the Peninsula Bank is not a creditor within the meaning of this statute is conceded. Is it a purchaser? Not by virtue of the after-acquired property clause found in its deed of trust certainly, for, as appears from the numerous authorities cited and relied on by counsel for Holt on pages 16 to 21 of their brief, the mortgagee, by virtue of such clause, takes such title only to after-acquired property as the mortgagor has. Among the leading cases cited is that of *Fosdick v. Schall*, 99 U. S., 339, where the Court says:

"As to that class of property (after acquired) it is well settled that the lien attaches subject to all the conditions with which it is encumbered when it comes into the hands of the mortgagor. The mortgagees take just such an interest in the property as the mortgagor acquires; no more, no less."

Reading that law into the instant case "the mortgagee (Peninsula Bank) takes just such an interest in the property (Sprinkler System Equipment) as the mortgagor (Knitting Mill Company) acquires; no more, no less." Indeed, by the very terms of the after-acquired clause used in the Peninsula Bank's mortgage, the sprinkler equipment is excluded, for the mortgage attempts to convey *only* such property as shall be "*acquired* and placed on the premises;" meaning clearly such property as the Knitting Mill Company should become the *owner*

of. It follows that the after-acquired clause could operate to vest title to the said sprinkler system equipment only after full payment of the purchase price to Holt and the conveyance of it by him to the Mill. If then, the Peninsula Bank is not a purchaser within the meaning of 2462 of the Code by virtue of the after-acquired clause aforesaid, it is not a purchaser at all, so far as the sprinkler equipment is concerned, for that equipment is not mentioned in its mortgage, was not then a part of the plant; indeed, was not then in existence. And while it is true, as claimed by counsel for the Peninsula Bank, that every deed of trust creditor in Virginia is a purchaser for value, this applies, of course, only to the property conveyed in the deed of trust. Surely it will not be seriously contended that the Peninsula Bank's purchase of the Knitting Mill plant in November, 1909, makes it a purchaser of the sprinkler equipment, installed in March, 1910, within the meaning of section 2462 of the Code. As well said by Holt's counsel, on page 15 of their brief: "The statute manifestly contemplates subsequent purchasers, for it obviously relates to a purchase of the subject of the conditional sale."

This view is clearly sanctioned in the following extract from the opinion of Cardwell, J., in *Monarch Laundry Co. v. Westbrook*, 109 Va. at 384:

"We consider it unnecessary to review at length the history, purpose and policy of the statute—Sec. 2462 of the Code, *supra*. Suffice it to say, that previous to this statute, the law of the State was, that where a vendor agreed to sell personal property for a price to be paid at a future time, and delivered the possession, but expressly retained title to the property until payment, such an agreement constituted a conditional sale; and though by parol or by an unrecorded in-

strument, such reservation was valid as against vendees, *creditors and subsequent purchasers* with or without notice. Whereupon, the statute, now Sec. 2462 *supra*, restricted that doctrine for the protection of *innocent third parties* by providing that such reservation of title should be void as to them unless recorded in such a way as to give notice." (Italics ours.)

It is plain that the words "innocent third parties" in the last sentence of the quoted extract are meant to be synonymous with "creditors and *subsequent purchasers*" in the sentence next preceding the last.

Since, then, the Peninsula Bank is neither a creditor nor a purchaser of the sprinkler equipment, and hence not protected under section 2462 of the Code, it is bound by the Holt contract, bound by it just as securely as the Knitting Mill Company.

Is the Sprinkler System a Permanent Fixture?

It only remains to inquire, therefore, whether the force and effect of the provisions of the Holt contract preserving the chattel character of the sprinkler equipment and retaining its ownership until paid for are to be overridden and destroyed upon the theory that the equipment has become a fixture—an inseparable part of the realty. In other words, can *those who are bound* by the Holt contract, say to Mr. Holt: "True, we agreed that this equipment until paid for should remain yours, be regarded as a chattel and removable at your pleasure for default in payment, and this was our intention when it was installed, but the character of the annexation and the use to which the equipment was to be put are inconsistent with that intention and will control?"

As for the character of the annexation in this case, the evidence shows it to be such that the sever-

ance of the sprinkler equipment is entirely feasible; that it would not impair the value of the plant, except to the extent of the loss of this equipment, that is, would leave the plant just as it was before the equipment was installed, would leave the bank with all the security it got under its mortgage or had a right to expect. As for the use of the equipment, it was designed wholly to reduce the fire hazard and thus lessen the cost of insurance; it was wholly in the interest of economy and in no sense essential to the operation of the mill.

(For a detailed recital of the facts proven with reference to the character of the annexation, see pp. 38 *et seq.* of the Brief of Holt's counsel.)

Certain it is that the character of the annexation and the use of this sprinkler equipment, as disclosed by the evidence in the record, are not sufficient to override the intention of the parties as evidenced by their express agreement that the property should retain its chattel character and the ownership of it remain with the vendor until paid for. In *Green v. Phillips*, 26 Grat., at 759, it is said:

"The true criterion of a fixture is the united application of the following requisites; annexation to the realty or something appurtenant thereto; application to the use or purpose to which that part of the realty with which it is connected is appropriated; *the intention of the party making the annexation to make a permanent accession to the freehold.*" (Italics ours.)

These same criteria are adopted by the Supreme Court of Illinois in the case of *Sword v. Low*, 13 N. E. 826 (cited and relied on by the Virginia Court of Appeals in the *Monarch Laundry case*, *supra*), and the Court adds:

"Mr. Ewell (page 22) says 'that of these three tests, the clear tendency of modern authority seems to give prominence to the question of intention to make the article a

permanent accession to the freehold, and the others seem to derive their chief value as evidence of such intention.' Washburn (page 8) lays down the rule 'It may be stated, in the first place, that whether a thing which may be a fixture becomes a part of the realty by annexing it depends, as a general proposition, upon the intention with which it was done.' * * *

"There seems to be a great unanimity in the authorities that things personal in their nature may retain their character of personality by the express agreement of the parties, although attached to the realty in such a manner as that, without such agreement, they would lose that character, provided they are so attached that they may be removed without material injury of the article itself or of the freehold. * * * So, in *Smith v. Benson*, 1 Hill, 176, Cowen, J., says: '*Prima facie*,' such buildings would be a fixture, and would not be removable; * * * but the parties concerned may control the legal effect of any transaction between them by an express agreement.'"

And this same element of intention is recognized in the *Monarch Laundry case*, *supra*, where it is said: "The reasoning of this line of cases is, that if the agreement of the parties and the purposes of justice require that the title to both should be kept separate, the Courts will so regard them."

The subjects of the conditional sale in the *Monarch Laundry Company case* were engine, boiler and laundry machinery, all indispensable to the operation of the plant; the character of the annexation was more secure and more permanent than in ours, and there was no express agreement, so far as the opinion of the Court shows, that it should retain its character of personality, but there was, of course, such an implied agreement, resulting from the reservation of title and of the right to remove for non-payment of the purchase price. The Court,

after reviewing the Virginia decisions on the subject of fixtures, where no question of *intention* was involved and the elements of annexation and use were alone considered, concluding its review with the case of *Haskins v. Cleveland Etc., Co.*, 94 Va. 439, says:

"The Court merely held that the property there involved was part of the realty and subject to a mechanics lien, and there was no question involved of retention of title to chattels, pursuant to the *intention* of the parties, as contemplated by the statute, section 2462 of the Code, *supra*."

And the principle of law announced by the Court in this Monarch Laundry case as controlling, is that even though the character of the annexation and the use of the chattels are such as to make it a *fixture*, it is nevertheless subject to the rights of third parties therein as against a subsequent purchaser of the realty with notice of those rights. To quote from the opinion: "Appellee's rights rest upon the principle of law established by a long line of authorities that a vendee or mortgagee of the realty with notice of the rights of third parties in *fixtures* takes subject thereto."

If this be true of a subsequent purchaser of the realty *with notice*, *a fortiori* is it true of a prior mortgagee of the realty who, as we have seen, is *not entitled to notice* and who takes such interest only in the fixtures as his mortgagor acquires.

In other words, if we put the prior mortgagee (Peninsula Bank) in the place of the purchaser with notice (Westbrook) in this Monarch Laundry case we have direct Virginia authority for our contention that this sprinkler system is not a fixture *quoad* the Peninsula Bank.

That the local law of Virginia will be followed by the Federal Courts in determining whether the sprinkler equipment in question is a fixture, see

N. Y. Life Ins. Co. v. Allison (C. C. A., 2nd Circuit), 107 Fed., 179, where it is said, p. 182:

"In determining what annexations to real property of chattels constitute a part of the realty, the Federal Courts ascertain the local law of real property by the decisions of the Courts of the states in which the property is situated, and when these decisions are explicit and uniform, adopt them as the rule of decision. *Davis v. Mason*, 1 Pet. 503; *Hinde v. Vatter*, 5 Pet. 398; *Suydam v. Williamson*, 24 How. 427; *Williams v. Kirtland*, 13 Wall. 306."

See also the numerous authorities to the same point cited in the brief of Holt's counsel.

In the case of *Insurance Co. v. Allison*, *supra*, the Court found that under the decisions of the New York Courts a machine does not become a part of the realty by merely attaching it to a building without the *intention* to make it a permanent accession, when it is not so incorporated with the building as to lose its identity or to render its removal injurious to the building, unless it is essential to the use to which the part of the building with which it is connected is appropriated; and, upon the facts in that case, the building being piped for regular lighting with gas but also equipped with an electric lighting system prepared for connection with the street supply, the Court held that the dynamos and engines, installed in the building from considerations of *economy only*, and *not from necessity*, did not become a part of the realty so as to pass under a prior mortgage as against a purchaser of such machinery from the mortgagor.

This case accords with the New York doctrine and, as already shown, the Virginia doctrine of fixtures is the same. The cases of *Union Trust Co. v. So. Saw Mills Co.*, 166 Fed. 193, and *Tippett v. Barham*, 180 Fed. 76, on which the lower courts relied in sustaining the claim of the Peninsula

Bank, do not purport to follow the Virginia doctrine; they follow the Massachusetts rule, and therein consists the error in the decisions in those cases and in the case at bar.

Without further elaborating, we adopt the very able brief of counsel for Holt, pages 21 to 45 on this subject of fixtures, and we direct especial attention to the following from *Jones on Chattel Mortgages*, quoted on page 37 of their brief:

"One holding a mortgage of the realty has no equitable claim to chattels subsequently annexed to it. He has parted with nothing on the faith of such chattels. Therefore, the title of a conditional vendor of such chattels, or of a mortgagee of them, before or at the time they were attached to the realty is just as good against the mortgagee of the realty as it is against the mortgagor."

There being no equity in the Peninsula Bank in support of its claim to this sprinkler system and it having acquired no legal claim to it on the date of adjudication of the conditional vendee to be a bankrupt, the legal lien in favor of the trustees created by the adjudication necessarily attaches free from any prior right in the bank. If the Holt debt had been paid prior to the adjudication the case would have been different, for then, the agreement, in pursuance of which the property preserved its chattel character, having been discharged by performance of the condition, its character of fixture would have been established, and that before the trustees acquired their lien.

It results that, whether the Peninsula Bank's claimed rights as to this sprinkler equipment be made to rest on the after-acquired property clause found in its mortgage, or on the doctrine of fixtures, they cannot vest until the conditions prescribed in the Holt contract of sale are performed, and by the adjudication of the Knitting Mill Com-

pany to be a bankrupt, such performance is rendered impossible.

But, with the trustees in bankruptcy, the case is different. Their status as judgment and execution creditors arose on September 7, 1910, six months after the completion of the installation of the sprinkler equipment. As to them, the statute, section 2462, expressly declares, in effect, that the sprinkler system equipment shall be regarded as being the absolute property of the vendee (Knitting Mill); and the lien of their execution will reach it; hence they are entitled to have its *pro rata* share of the total proceeds of the sale of the plant ascertained and paid over to the general fund, since by consent of all parties this equipment has been sold as part of the plant, and the rights of all parties relegated to the fund derived from such sale.

Respectfully submitted,

O. D. BATCHELOR,
Of Counsel for Trustees in Bankruptcy.

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Statement of the Case.

HOLT v. HENLEY, TRUSTEE.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE
FOURTH CIRCUIT.

No. 229. Argued March 5, 1914.—Decided March 16, 1914.

The amendment to the Bankruptcy Act of June 25, 1910, giving the trustees, as to all property coming into the custody of the Bankruptcy Court, the rights of a creditor holding a lien, should not be construed to impair then existing rights.

Whether the power of Congress is limited in that respect or not, the usual interpretation of such statutes is to confine their effect to property rights subsequently established.

The right of one who had sold to the bankrupt under an agreement to retain title until payment, as it existed on June 25, 1910, was not affected by the amendment to the Bankruptcy Act of that date even if he did not comply with the statute of the State in regard to recording the agreement.

The goods in this case having been sold on conditional sale prior to the amendment of June 25, 1910, the seller had a better title than the trustee. *York Manufacturing Co. v. Cassell*, 201 U. S. 344.

Where the addition to the premises covered by the mortgage is not in its nature an essential indispensable part of the completed structure contemplated by that instrument, and its removal would not affect the integrity of that structure, the mortgagee takes just such interest in the addition as the mortgagor acquired, no more no less.

A sprinkler plant placed on mortgaged premises after the execution of that instrument and under an unrecorded conditional sale agreement held not to have attached to the freehold or to be covered by the after acquired property clause beyond the extent which the mortgagor had acquired.

193 Fed. Rep. 1020, reversed.

THE facts, which involve the relative rights of the trustee in bankruptcy, the mortgagee and the original owner of a sprinkling plant placed on the property of the bankrupt subsequent to the making of the mortgage

under an agreement of conditional sale, are stated in the opinion.

Mr. S. O. Bland, with whom *Mr. R. T. Armistead* was on the brief, for appellant.

Mr. Norvell L. Henley for the Peninsula Bank and Henley, trustee.

Mr. O. D. Batchelor for Phillips, Spencer and Cooke, trustees in bankruptcy.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition to the District Court sitting in Bankruptcy for leave to remove an automatic sprinkler system and equipment from the premises of the bankrupt, the Williamsburg Knitting Mill Company. It is opposed by the trustee of a mortgage of the plant of the Company and the holder of the mortgage notes, and by the trustees in bankruptcy, both of which parties claim the property. The referee, the District Court and the Circuit Court of Appeals decided in favor of the latter claims. 190 Fed. Rep. 871. 193 Fed. Rep. 1020, 113 C. C. A. 87. The petitioner, Holt, appeals. The facts are as follows: An agreement to install the sprinkler was signed by Holt on August 28, 1909 and by the bankrupt on October 14, 1909. The installation was begun about December 6, 1909 and finished in the latter part of March 1910, the equipment consisting of a fifty-thousand gallon tank on a steel tower bolted to a concrete foundation, pipes connecting the tank with the mill. By the agreement the system was to remain Holt's property until paid for and Holt was to have a right to enter and remove it upon a failure to pay as agreed. It also was to be personal property during the same time. A large part of the price has not been paid. But by the Code of Virginia, § 2462, unless registered as therein provided, which this was not, such sales are void

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as to creditors (construed by the Virginia courts to mean lien creditors only), and as to purchasers for value without notice from the vendee. On November 23, 1909, the mortgage deed was executed, covering the plant on the premises and that 'which may be acquired and placed upon the said premises during the continuance of this trust.' The mortgagees claim the system by virtue of this clause and the fact that it had been attached to the soil. As bearing on this last it should be added that there now is a smaller tank on the same steel tower, that supplies the mill for domestic purposes, but this was not put there by Holt.

The trustees in bankruptcy join with Holt in disputing the claim of the mortgagees, but set up one of their own, which we will deal with before discussing that of the mortgagees. They rely upon the act of June 25, 1910, c. 412, § 8, 36 Stat. 838, 840, amending § 47a (2) of the Bankruptcy Act, and giving them, as to all property coming into the custody of the Bankruptcy Court, the rights of a creditor holding a lien. Before that amendment, Holt had a better title than the trustees would have got. *York Manufacturing Co. v. Cassell*, 201 U. S. 344. We are of opinion that the act should not be construed to impair it. We do not need to consider whether or how far in any event the constitutional power of Congress would have been limited. It is enough that the reasonable and usual interpretation of such statutes is to confine their effect, so far as may be, to property rights established after they were passed. If, as they sometimes do, the registry statute had fixed a time within which the registration must take place and the time had elapsed, we think it clear that the amendment would not be read as attempting to diminish Holt's rights. But the most obvious if not the only way of reaching that result would be by taking the amendment to affect subsequently established rights alone. That is a familiar and natural mode of interpretation, whereas it

would be highly artificial to say that it affected existing rights that still might be secured but not those for which the chance had been lost. Therefore we think it immaterial if true, that for a month or two after the amendment was passed Holt might have docketed a memorandum as provided by the Virginia act. The retention of title by him and his refraining from recording it both were perfectly lawful. His continuing title simply was postponed to purchasers without notice and creditors getting a lien. We are of opinion that it was not affected by the enactment of later date than the conditional sale. The opposite construction would not simply extend a remedy but would impute to the act of Congress an intent to take away rights lawfully retained, and unimpeachable at the moment when they took their start. We agree with the decision in *Arctic Ice Machine Co. v. Armstrong County Trust Co.*, 192 Fed. Rep. 114; 112 C. C. A. 458. *In re Schneider*, 203 Fed. Rep. 589. See also *Southwestern Coal & Improvement Co. v. McBride*, 185 U. S. 499, 503.

We turn now to the claim of the mortgagees. This is based upon the clause extending the mortgage to plant that may be acquired and placed upon the premises while the mortgage is in force, coupled with the subsequent attachment of the system to the freehold. But the foundation upon which all their rights depend is the Virginia statute giving priority to purchasers for value without notice over Holt's unrecorded reservation of title; and as the mortgage deed was executed before the sprinkler system was put in and the mortgagees made no advance on the faith of it, they were not purchasers for value as against Holt. *York Manufacturing Co. v. Cassell*, 201 U. S. 344, 351, 352. There are no special facts to give them a better position in that regard. But that being so, what reason can be given for not respecting Holt's title as against them? The system was attached to the freehold, but it could be removed without any serious harm for which complaint

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could be made against Holt, other than the loss of the system itself. Removal would not affect the integrity of the structure on which the mortgagees advanced. To hold that the mere fact of annexing the system to the freehold overrode the agreement that it should remain personalty and still belong to Holt would be to give a mystic importance to attachment by bolts and screws. For as we have said, the mortgagees have no equity and do not bring themselves within the statutory provision. We believe the better rule in a case like this, and the one consistent with the Virginia decisions so far as they have gone, is that "the mortgagees take just such an interest in the property as the mortgagor acquired; no more no less." *Fosdick v. Schall*, 99 U. S. 235. *Meyer v. Western Car Co.*, 102 U. S. 1. *Monarch Laundry v. Westbrook*, 109 Virginia, 382, 384, 385. *Hurxthal v. Hurxthal*, 45 W. Va. 584. *Campbell v. Roddy*, 44 N. J. Eq. 244. *Davis v. Bliss*, 187 N. Y. 77. *Hendy v. Dinkerhoff*, 57 California, 3. *Binkley v. Forkner*, 117 Indiana, 176. *Cox v. New Bern Lighting & Fuel Co.*, 151 No. Car. 62. *Baldwin v. Young*, 47 La. Ann. 1466; *In re Sunflower State Refining Co.*, 195 Fed. Rep. 180, 187. The case is not like those in which the addition was in its nature an essential indispensable part of the completed structure contemplated by the mortgage. The system although useful and valuable can be removed and the works still go on.

Decree reversed.